INDEX TO APPENDIX

	PAGE
Docket Entries	1
Motion Under 28 U.S.C. Section 2255 to Vacate And Set Aside Judgment And Dismiss Indictment, Or, In The Alternative, To Vacate And Set Aside Judgment And For A New Trial	2
Transcript Of Proceedings In The Criminal Trial From Appellant's Appendix In *United States Of America* v. *Mackey*, No. 14584, In The United States Court Of Appeals For The Seventh Circuit	7
Order Filed August 13, 1968 Denying Motion	26
Memorandum Of The District Court Filed September 6, 1968	27
Notice Of Appeal Filed September 13, 1968	39
Stipulation To Make Copies Of Exhibits Part Of The Record And Exhibits	40
Judgment Of The United States Court Of Appeals For The Seventh Circuit	46
Opinion Of The United States Court Of Appeals For The Seventh Circuit	47

IN THE UNITED STATES DISTRICT COURT
Northern District Of Indiana
Hammond Division

FRED T. MACKEY
vs.
UNITED STATES OF AMERICA
} Civil No. 4879

DOCKET ENTRIES.

2-12-68—Motion under 28 U.S.C. Section 2255 to vacate and set aside Judgment and Dismiss Indictment, or in the alternative to vacate and set aside judgment and for a new trial filed.

7-22-68—U. S. Attorney files memo brief in opposition to petitioner's motion filed pursuant to Title 28 U.S.C. Section 2255 with certificate of service by mail.

8-1-68—Plaintiff files Memo In Support of Motion under 28 U.S.C. Sec. 2255. Aff. of service attached (card to Jim)

8-9-68—U. S. Atty files reply brief with certificate of servict by mail. (card to Jim).

8-13-68—Order entered: Plaintiff Fred T. Mackey having filed a motion for collateral relief from the judgment of this court in Hammond Criminal No. 3411, pursuant to Title 28 U.S.C. 2255, the court, finding that the motion, records and files of this case conclusively show that the petitioner is entitled to no relief, hereby DENIES said motion for the reasons stated in the memorandum to follows (SE). Beamer;j (copies to counsel).

9-6-68—Memorandum entered denying plaintiffs petition for relief (SE). Beamer;j (copy to Atty. Atty Robert J. Downing and Fred T. Mackey)

9-13-68—Petitioner files notice of appeal.

9-13-68—Clerks certificate of mailing issued and forwarded to counsel.

A True Copy:
Attest: Francis T. Grandys, Clerk

IN THE UNITED STATES DISTRICT COURT
Northern District Of Indiana
Hammond Division

(Filed February 12, 1968)

FRED T. MACKEY
vs.
UNITED STATES OF AMERICA
} Civil No. 4879

[1] MOTION UNDER 28 U.S.C. SECTION 2255 TO VACATE AND SET ASIDE JUDGMENT AND DISMISS INDICTMENT, OR, IN THE ALTERNATIVE, TO VACATE AND SET ASIDE JUDGMENT AND FOR A NEW TRIAL.

Plaintiff Fred T. Mackey by his attorneys Robert J. Downing and William M. Ward moves this Court to vacate a sentence heretofore imposed and dismiss the indictments, or, in the alternative, to vacate said sentence and for a new trial, and for reasons therefore states as follows:

1. On January 21, 1964, in a cause then pending before this court entitled *United States* v. *Mackey*, Criminal No. 3411, plaintiff Mackey was found guilty by a jury on an indictment of five counts charging violation of 26 U.S.C. 7201, Internal Revenue Code, for the years 1956 through 1960.

2. On March 24, 1964, this Court entered judgment and plaintiff was sentenced to five years imprisonment on each count to run concurrently, and was fined $10,000 on each count. This judgment and sentence was affirmed by the Court of Appeals for the Seventh Circuit and a Petition to the Supreme Court for a Writ of Certiorari

therefore was denied. Plaintiff Mackey is presently [2] and since December, 1965 has been serving this sentence.

3. On January 29, 1968, the Supreme Court of the United States in *Marchetti* v. *U. S.* and *Grosso* v. *U. S.*, 36 L.W. 4143 and 4150 held:

A) That the interrelated statutory system for taxing wagers (26 U.S.C., Sect. 4401 et. seq.) violated a taxpayer's privilege against self-incrimination as guaranteed by the Fifth Amendment to the United States Constitution; and,

B) That Internal Revenue Service Forms 730 required to be filed monthly by a taxpayer with the payment of the excise tax on wagering violated the taxpayer's privilege against self-incrimination.

4. That during Mackey's trial in the Court in *U. S.* v. *Mackey,* Crim. No. 3411, the Government, over Mackey's objection, offered as Government exhibits 30 thru 89 inclusive, sixty (60) monthly Form 730 wagering excise tax returns previously filed by Mackey with the Internal Revenue Service pursuant to the statutory scheme condemned in *Marchetti* and *Grosso*; that this Court at the time said Form 730's were offered by the Government characterized said exhibits as "somewhat inflammatory" but thereafter admitted said returns into evidence upon the Government's assertion that these returns were necessary evidence to provide evidentiary and factual support to another Government exhibit (Exhibit 765, a net worth summary), (*U. S.* v. *Mackey,* Crim. No. 3411, Tr. 2475-2479, 4621-4634 (copies of which are attached); see also 5519, 5524-5528; and pp. 22-23 Tr. of March 24, 1964 hearing on defendant's motion to reconsider).

[3] 5. That in its final argument to the jury, the Government then contended that the aforesaid Forms 730 showed a likely source of Petitioner's income from gambling, a necessary element of the case to be proved by the Government in a net worth type case (Tr. 5669-5670, copies of which are attached); and that on appeal in the Court of Appeals for the 7th Circuit, the Government contended and argued that the admission of these wagering tax returns "constituted a part of the Government's case on the important issue of a likely source of unreported taxable income" (Government's Brief, p. 43, *U. S.* v. *Mackey,* No. 14584 in the Court of Appeals for the 7th Circuit).

6. That the incriminating admissions of gambling activities, and the other incriminating information relative thereto as contained in the said Form 730's were coerced from plaintiff Mackey pursuant to and under pain of punishment as prescribed in the aforesaid statutory system for taxing wages in violation of Mackey's privilege against self-incrimination as guaranteed by the Fifth Amendment of the Constitution of the United States. As such, said Form 730's were:

A. Constitutionally inadmissible in evidence against Mackey at his trial; and

B. As admitted, the inflammatory and prejudicial Form 730's adversely influenced the very reliability and integrity of the fact finding process at his trial so as to prevent Mackey from having a fair trial.

7. That the privilege against self-incrimination extends not only to answers that would in themselves support a conviction [4] of the crime charged, but likewise embraces those answers or statements which could be

used as investigatory leads, or which would furnish a link in the chain of evidence needed to convict. That the incriminating statements and admissions concerning wagering and gambling contained in said Form 730's in violation of movant's privilege against self-incrimination provided a) investigatory leads to the Government which lead to the indictment of Mackey and the evidence introduced by the Government at his trial which was the fruit of said investigatory leads, and b) a link in the chain of evidence which by the Government's own admissions was needed to convict Mackey.

8. That the coercion from Mackey of the aforesaid incriminatory Forms 730 and their admission against him at his trial was a denial of his constitutional privilege against self-incrimination and his right to a fair trial.

9. That Fred T. Mackey's liberty has been restrained since December, 1965 as a result of a trial in which the use of the inflammatory and unconstitutionally obtained Form 730's were admitted as an integral part of the Government's proof of "likely source" as required in net-worth type cases.

Wherefore, movant prays as follows:

1. That this Court cause notice of the filing of this cause to be served upon the United States Attorney for the Northern District of Indiana, and grant a prompt hearing thereon pursuant to 28 U.S.C. Sect. 2255;

[5] 2. That this Court vacate and set aside its judgment of conviction and sentence heretofore entered on March 24, 1964, in the cause entitled *United States* v. *Mackey,* Criminal No. 3411, and order the plaintiff dis-

charged from the custody of the Attorney General and the indictments in said cause dismissed; or, in the alternative, order plaintiff discharged from the custody of the Attorney General and order a new trial in said cause.

3. That this Court take whatever other and further action the Court deems just and equitable in the premises.

Respectfully submitted,

Fred T. Mackey, Plaintiff
By /s/ Robert J. Downing
/s/ William M. Ward

TRANSCRIPT OF PROCEEDINGS IN THE CRIMINAL TRIAL IN THE UNITED STATES DISTIRCT COURT FOR THE NORTHERN DISTRICT OF INDIANA, HAMMOND DIVISION

[Appendix Volume III, pp. 1364-1373]

* * * * *

[4621] Mr. Downing: Before any testimony is elicited with respect to Government Exhibit 765, I want to strenuously object as to the admissibility of any testimony of this type for the following reasons:

The only purpose for making any reference to the 730 forms is for the purposes of inflammatory prejudice, bias, and to completely muddy up the waters here insofar as the questions involved in the indictment in this case.

The testimony in this record to date clearly indicates that Schedule C on the [4622] various returns were prepared, but they pertain to policy, as distinguished from insurance policy—and I am not sure you distinguish it in any respect—but for the purpose of the record, there has been testimony, and the testimony was by Frank Smith, in substance, that the figure on Line 1 of Schedule C pertains to this item and was arrived at by him, this is his computation, by taking, as he called it, the ins, from which he deducted the outs, and then he made the return.

He also listed on the return the excise tax, and he stated that the excise tax was ten per cent of the gross amount, or the amount of the ins as listed on the books which he had. Therefore, unless there is some question with respect to the accuracy of the excise tax payment —and we are not on trial for that, that it was or was not properly paid, it is a separate offense—we cannot

be charged in this indictment for the amount of excise tax paid. That is a separate matter.

[4623] Therefore, I say there is absolutely no reason why this type of exhibit, or any testimony relative to that should be permitted. It is like the ringing bell that you cannot unring once you get it started—once you would get it in, it would be in.

We have been proceeding along in this case for four weeks on nothing but insurance, except for the isolated testimony of Mr. Smith, and now, they cap it off with a projection here that we are not on trial for.

The Court: I understand that.

Mr. Downing: The point is the testimony he seeks to offer is already in evidence, without the necessity of what is Form 730; this only magnifies something—

[4624] The Court: The point is, that the evidence shown by this exhibit is already in evidence?

Mr. Downing: Yes, your Honor, it can be computed by taking the amount of the net—

The Court: Well, you are talking about the form of the evidence. Sure you can compute lots of things, but I am not going to control the method by which the Government puts in evidence, if they have competent evidence.

Mr. McNelis: May I show your Honor the Schedule of the 1956 return, which is in evidence (indicating). That line calls for total receipts, Line 1, and I ask your Honor to compare the figures the total receipts, and the total receipts is the same as gross receipts in any parlance, your Honor.

Mr. Downing: Now, there is absolutely no testimony, except what Mr. Smith has testified to, that is in the record, and [4625] Mr. Smith testified as to what he did.

Mr. McNelis: Let us not forget what Laura McComb testified in connection with this.

Mr. Downing: She did not prepare the income tax returns that we are on trial for.

The Court: What do you propose to do with this, Mr. McNelis?

Mr. McNelis: Show the combination, your Honor, between what is in the record—

The Court: Well, I think this can only be done after the returns are in evidence. Isn't that right?

Mr. McNelis: Yes, your Honor, and at this minute, I intended to offer the wagering tax returns in evidence. They are not in. The only ones offered were 50 to 89, I believe when Miss Laura McComb was testifying, and your Honor reserved ruling—well, the returns from 30 to 58 were not offered yet. I intended to do it at this particular minute, I was going to offer those returns, your Honor.

Mr. Downing: If your Honor please, [4626] these characterizations are merely their own characterizations.

The Court: What does the total receipts mean on this exhibit, Schedule C?

Mr. Downing: Oh, your Honor, I agree that total receipts could mean what you are asking, but the point is that insofar as the practice of this, the practice which was followed—I recall very clearly the testimony wherein Mr. Smith was asked, "How did you prepare this", and he testified as to how he prepared it. Now this exhibit here (indicating) over here, not the return that you have, your Honor, but this Exhibit 765 is based upon these 730 Forms.

The Court: Yes.

[4627] Mr. Downing: As I say, your Honor, without the necessity of putting in the 730, this is the same type of computation.

The Court: I rejected the 730 originally on the grounds that Schedule C on the return showed the information contained in the 730, if that is the gambling tax return. Then I thought it was cumulative, and I thought somewhat inflammatory.

Mr. McNelis: I would ask Mr. Downing, your Honor, to work with those returns as long as he desires, and if he can show me where these amounts of money are, I should be delighted to find out where they are.

Mr. Downing: If I may, and let me have the return, and let me explain my position.

I am looking at what is identified as the exhibit, and let's be specific—

Mr. McNelis: That is the year 1956?

Mr. Downing: Yes. For the year 1956 on Schedule C, he shows excise tax of $14,226.86, and Mr. McNelis asked Mr. Smith [4628] how he arrived at that figure. He said ten per cent of the gross. Therefore, having to accept Mr. Smith's testimony, $142,268.60 represents the gross receipts as set forth in the ins section, the total set forth in the first line of Schedule C, the $35,640.00.

I submit to your Honor that insofar as the figures are concerned, it is obvious that the difference represents what Mr. Smith has characterized as outs.

Mr. McNelis: In following it through, your Honor, we will see on the return at least some deductions. There is no question that some of them are on the return, and what are these so-called outs reflected on the return?

The Court: Well, I am going to let the returns in. I don't know whether or not I will let this in, but I will let the 730, or whatever the number is, I will let that in. I think they are competent evidence, and in view of the statements that all of the information that is [4629] contained thereon is not shown on Schedule C of the an-

nual returns, I am going to let them in. I do not think the Government is required to ask the jury or anyone else to make a computation from Schedule C, if that is the only evidence available.

Mr. Downing: The only purpose, your Honor, and my objection goes, of course, to the 730 forms as well as the document here—I object for the reasons I have just stated. The only purpose for offering the wagering stamp or the 730 forms is strictly from the standpoint of trying to get something in that they have otherwise not been able to do.

The Court: There is no question but that it is income, Mr. McNelis?

Mr. McNelis: Are you asking me? I don't know.

The Court: No, I meant Mr. Downing.

Mr. Downing: I don't know whether it is or is not. To the extent, if this money was paid out, there is no tax.

[4630] The Court: Well, it is income, no matter how you arrive at it.

Mr. Downing: It does not shed any light.

[4631] The Court: Well, proceed. I think there is no objection before me.

You are going to offer objections to any reference—

Mr. Downing: I wanted the record to be clear before there was any testimony, that any testimony pertaining to Exhibit 765, I would object to any testimony for the reasons set forth, as well as the fact that this is based on Government Exhibits 30 to 89, that are not in evidence at this time.

Mr. McNelis: I am going to offer them now.

Mr. Downing: Let the record show that my objections to Government Exhibits 30 to 89 are for the reasons I stated, without having to come up here to state them again.

The Court: Very well.

Mr. Downing: I further want the record to show with respect to Government Exhibits 30 to 50, those are the ones where the record does not show who prepared [4632] them.

The Court: They are signed by the defendant.

Mr. Downing: There is no testimony in, your Honor, with respect to those returns.

Mr. McNelis: I do have them here and if Mr. Downing wants them identified, I have the District representative here who will testify they were located in the office of the District Director, and received in the normal course of business by the District Director's office.

The Court: Very well.

Mr. McNelis: I have Mr. Hopkins out here, if that is part of your objection.

Mr. Downing: I would be glad to stipulate that Mr. Hopkins would so testify, but it still does not tie it to the defendant, and I object.

The Court: Well, if you will stipulate he would so testify.

[4634] Mr. McNelis: May it please the Court:

At this time, your Honor, the Government offers in evidence Government's Exhibits 30 through 51, your Honor; and reoffers Government's Exhibits 52, through and including 89.

Mr. Downing: Objection, for the reasons just stated.

The Court: Very well. The objection is overruled. The exhibits are admitted.

Mr. McNelis: May the record show, your Honor, I am presenting to the witness, Mr. Harrington, Government's Exhibits 30 through and including Government's Exhibit 89?

Mr. McNelis: And I am also presenting to the witness, your Honor, Government's Exhibits in evidence No. 9, individual income tax return of Fred Mackey—Fred and Ella Mackey for the calendar year 1956; Government's Exhibit 10, individual income tax return of Fred and Ella Mackey for the year 1957; Government's Exhibit 11, return of the same two individuals for the year 1958; Government's Exhibit 12, the same individuals for the year 1959; and Government's Exhibit 13, individual income tax return of Fred and Ella Mackey for the year 1960.

By Mr. McNelis:

Q. Mr. Harrington, do you have before you Government's Exhibit for identification 765?

A. Yes, I do.

Q. Was that Government's Exhibit for identification 765, Mr. Harrington, made at my request?

A. Yes, it was.

Q. And from where did you get the information, Mr. Harrington, that is reflected on Government's Exhibit 765?

A. The information was taken from Form 730's filed for the years 1956 through 1960.

Q. They are, Mr. Harrington, Government's Exhibits 30 through and including 89?

A. That's right.

Q. And what other facts?

A. The income tax returns for 1956 through 1960. [4636] Q. And did you use the entire income tax returns, Mr. Harrington, for the years 1956 through 1960, or portions thereof?

A. Just a portion.

Q. And what portion did you use, Mr. Harrington?

A. A Schedule C.

Q. Was a Schedule C in each and every instance a part of the return for the particular year involved?

A. Yes, it was.

Mr. McNelis: Your Honor, at this time the Government will offer in evidence Government's Exhibit 765.

Mr. Downing: The same objection, your Honor.

The Court: I think without further explanation I will sustain the objection. I don't think—while he has testified as to what it is, he has testified as to how he made it, but unless it is self-explanatory—and I don't have a copy of it—

Mr. McNelis: I am sorry, your Honor. I thought you had one.

[4637] The Court: The objection is overruled. It may be admitted.

By Mr. McNelis: You have it before you, Mr. Harrington.

The Witness: Yes.

By Mr. McNelis:

Q. Mr. Harrington, in connection with Government's Exhibit 765, for the year 1956 you have a figure of $142,668.25. Is that correct?

A. Yes, sir.

Q. From where did you get that figure, Mr. Harrington?

[4638] A. This is a yearly total of the Form 730's, taking the gross amount of wagers as reported on those forms.

Q. And the next figure in the column 1956 that you have is $19,662.93?

A. This is a total—

Q. Where did you get that figure, Mr. Harrington?

A. This is a total of the expenses listed on Schedule C of that—for this operation.

Q. Could you refer to the Government's Schedule C you are referring to, Mr. Harrington?

A. Schedule C on—Exhibit 9 (indicating).

Q. And the third figure in the column 1956, Mr. Harrington; from where did you get that figure?

A. That is the difference between the income, or the gross amount of the wagers reported for the year 1956 and the expenses claimed on Schedule C.

Q. What is the difference, Mr. Harrington?

A. $123,005.32.

Q. And the next figure under 1956, Mr. Harrington, is what?

A. It is the net profit shown on Schedule C of Exhibit 9.

Q. And what is that net profit, Mr. Harrington?

A. 15,977.31.

Q. And the next figure, Mr. Harrington, for 1956 [4639] is what?

A. Is $107,027.61.

Q. And from where did you get that figure, Mr. Harrington?

A. That is the difference between the 123,000 and the 15,000 reported as profit on Schedule C on Exhibit 9.

Q. And, Mr. Harrington, for the Government's Exhibit 765 for the years, 1957, 1958, 1959 and '60 you have prepared the same type of information in columnar form, did you not?

A. That is right?

Q. And the information there was obtained from the sources you related with respect to the year 1956?

A. That is right.

Q. Except that for '57 you used the '57 return; for '58 you used the '58 return; for '59 the '59 return, and for '60 the '60 return?

A. True.

Mr. Downing: If your Honor please, we would like to reserve cross examination and do it all at one time. I understand he is to be recalled?

• • • • •

[Appendix Volume IV, p. 1875]

[5589] Mrs. Fannye Benford would suggest to you, ladies and gentlemen, Mr. Fred Mackey never went near those three safes. Mrs. Fannye Benford would have you believe, ladies and gentlemen, that Mr. Fred Mackey never had $50,000.00. The very testimony "He don't have that kind of money. He didn't have that kind of money."

May I suggest, ladies and gentlemen, in your examination of the evidence in this case and particularly the documentary evidence, that you take a look at Government's Exhibits 51 through 89, and may I suggest in connection with that, to expedite your examination, Government's Exhibit 765, another one of Mr. Harrington's now famous charts. His Honor will instruct you on what use these may be to you. They are not evidence. They are merely to aid you and assist you so you do not have to get your papers and pencils out and do your computations. But, look at Government's Exhibit 765, and you determine on the basis of varied documents prepared at the direction of the defendant by Miss Laura McComb from books and records and information given her [5590] by the defendant, whether Mr. Fred Mackey ever had $50,000.00.

• • • • •

[Appendix Volume IV, pp. 1920-1921]

[5669] phoney mortgage, not one cent of money passed for that mortgage.

You may recall that I asked Mrs. Benford about that same mortgage, and she did not know anything about it. Yet, when she was shown the document, her signature, her very own signature which she admitted was on that document.

Again, with respect to cash on hand, current taxable income. Where did the money come from? I don't know. I can hazard a guess, and to the extent that this might be speculation, it is speculation.

I talked about Government Exhibit 765 this morning, Mr. Downing talked about it this afternoon, and I am now talking about it again. What is Government Exhibit 765?

It is no more or no less than totaling figures from Government Exhibits 30 through 89, the so-called 730 returns, the so-called wager tax returns, the so-called, as Mr. Downing refers to them, policy returns—policy, to be sharply distinguished from the policy written by Gibraltar Insurance Company, or Gibraltar Mutual Life Insurance Company.

Those returns, if you recall the [5670] testimony of Miss Laura McComb, were prepared by her, at least from 1958 on, and they were prepared by her from information given to her by none other than this defendant, Fred Mackey. There is where the information came from.

Oh, it is true, that Mr. Smith talked about the "ins", and the "outs", but who was the only person that really knows whether all of the "ins" are in, and who is the only person who really knows whether all of the "outs", were really paid out? Not Frank Smith, not Laura Mc-

Comb, not Mr. Kallimani, not Mr. Harrington, not Mr. Blackwell. There sits the only man who knows whether those forms were correct. Nobody in the Government knows that.

Mr. Downing wants a likely source for the increases in net worth. I respectfully suggest that Government Exhibit 765 is a most likely source.

Mr. Downing wants a likely source. I respectfully suggest another likely source. We did hear in this case an awful lot about stocks, rents, dividends. Who got dividends on all of the stock? Mrs. Fannye Benford, after she realized what was going on, would have to be shown the documents before

* * * * *

[Appendix Volume I, pp. 224-231]

Mr. Downing: My objection was as to Exhibits 1 through 8.

The Court: Exhibits 1 through 8 are admitted.

[250] Mr. Downing: If your Honor please, with respect to Government's Exhibits 9 through 13, I have no objection as to the authenticity or in general as to their materiality or relevancy.

There are statements which are included on the returns which raise a question of interpretation, if you will—for instance, on Government's Exhibit—that is for the year 1960, that is No. 13 (submitting exhibit to the Court). Schedule C, there is a reference to the word "policy" (indicating).

The Court: A reference to what?

Mr. Downing: The word "policy", p-o-l-i-c-y (indicating).

There are certainly many connotations that can be applied to that word, standing alone: The question of wheth-

er or not it is a matter of violation of a state statute, which [251] we are not on trial for; the question of whether or not this has any other meaning—at the moment I am not sure.

It is up to the Government, of course, to establish its case.

Now, in that connection there are other returns that have different statements—unfortunately, the pattern of consistency here was not always the same.

[252] For the year 1959 (submitting exhibit), the same schedule, that is, Exhibit No. 12, the same schedule has written after the typed word "policy," the word "wheel" (indicating).

Now, the defendant objects, because we have no knowledge as to how and when that was written into that return. It is inconsistent with not only the 1960 return, but it is also inconsistent with another portion of this return, —excuse me, please—do you have the part that you have deleted from '59 that shows the self-employment tax, Charley?

Mr. McNelis: (Presenting exhibit.) Not on this one, no; we have just the return as filed.

Mr. Downing: No, no; the part that was taken off at this perforation (indicating)?

What I am getting at is, if I recall, this is the one that shows "policy", just "policy" in another portion of this return.

Mr. McNelis: You have them there, the originals.

Mr. Downing: Yes, but the perforation has been taken off (indicating).

Mr. McNelis: What is your objection?

Mr. Downing: What I am trying to point out is that on the bottom of the self-employment tax form here [253] the words typed in here, "policy" (indicating).

Mr. McNelis: You said the words were typed in, "policy"?

Mr. Downing: It was typed in, "policy."

Mr. McNelis: May I ask the source of your information?

Mr. Downing: From the copy that was returned by the taxpayer. Now, that is the same as the way it is on here (indicating).

The Court: That was under the Social Security form?

Mr. Downing: Yes, the self-employment.

The Court: Can you account for the fact that "wheel" is written in?

Mr. McNelis: Your Honor, the next witness will be the individual who prepared these returns.

The Court: All right. We will reserve ruling on this until such time as you have him on the stand.

Let's see, that was Exhibit No. —

Mr. Downing: That was Exhibit 12.

The Court: All right.

Mr. Downing: Now, this one here definitely was typed in (submitting exhibit).

Mr. McNelis: May I ask what the exhibit number [254] is?

Mr. Downing: That is Exhibit No. 11.

That one raises this question about the gambling, the violation of any Indiana gambling law.

The Court: Well, what is the point about the Indiana Gambling law?

Mr. Downing: My point is that the question of any policy operation having to do with or indicating a violation of any Indiana gambling law is going to be prejudicial to this defendant.

The Court: It is his return.

Mr. Downing: That may be. I agree with you. But, nevertheless, insofar as the return is concerned, that portion of it can be blacked out so that the source of the net income is "other income." Otherwise, we are going to be trying this case on a question of violation of a State law, rather than—

The Court: No, we are not going to try it on that basis, I assure you. If it gets into the case, the jury will be adequately instructed on that.

Mr. Downing: Well, that is the basis of the objection to the '57 return; it shows "policy operator."

And in the '56 return, it also uses the characterization, "policy operator."

[255] The Court: Yes.

Mr. Downing: Now, that is the basis of our objections to Exhibits 9 through 13, and the one with respect to Exhibit 12 has to do with the question concerning the writing in of the word "wheel."

The Court: I will reserve ruling on Exhibits 9 through 13 until we hear the testimony.

[258] Mr. McNelis:

(Government submitted Exhibits Nos. 14, 15, 16 and 17 into evidence. Corporate Income Tax Returns, M. W. & E. Investment Company for fiscal years 1958, 1959, 1960, 1961.)

[259] Mr. Downing: Your Honor, with respect to Exhibits 14 through 17, the returns purport to be the returns of M. W. E. & S. Investment Company, Inc. for the years to which Mr. McNelis has referred.

The Indictment does not charge any alleged invasion or evasion of tax returns by Mr. Mackey on behalf of this company.

The Court: I will reserve ruling until the matter is connected up.

Mr. McNelis: May we approach the bench, your Honor?

The Court: Yes.

[260] The Court: He has brought up the question that this company is not charged.

Mr. Downing: That corporation.

Mr. McNelis: That is correct, your Honor.

The Court: Well, I think I could rule either way on them. I could let them go in subject to a motion to strike if not connected up, but I prefer the other method because that would require more bookkeeping. I will reserve the ruling until there is some connection shown.

The Court: I will reserve ruling on the motion to introduce Exhibits 14, 15, 16, and 17.

[261-262] Mr. McNelis:

(Whereupon Government submitted exhibits Nos. 18 through 23, U. S. Life Insurance Company Income Tax Returns, Gibraltar Industrial Life Insurance Company for calendar years 1954 through 1959.)

Mr. Downing: The defendant makes the same objection.

[263] The Court: All right, we will reserve the rulings.

Mr. McNelis: Thank you, your Honor.

Shall I proceed, your Honor?

The Court: You may proceed.

Mr. McNelis:

(Whereupon Government offered exhibits 24 through 29, U. S. Life Insurance Income Tax Returns, Gibraltar Mutual Life Insurance Company for years 1955 through 1960.)

[264] Mr. Downing: The same motion, your Honor.

The Court: All right. The same rulings. The rulings will be reserved.

Mr. Downing: The group of exhibits commencing with Exhibit No. 30 through 95—I suppose these are the series that you are now going to offer?

Mr. McNelis: That is correct.

Mr. Downing: Has to do with the tax on wagering, as well as the 11-C?

Mr. McNelis: That is correct.

Mr. Downing: Has to do with the forms pertaining to the tax on wagering, as well as application for the wagering stamps.

They involve the—I note that No. 95 has to do for the year 1961, which is another objection. That, I believe, is generally separate from the one that I am going to make.

The Court: All right. Is that offered?

[265] Mr. McNelis: This was offered, your Honor, for the purpose of showing the earned income of the debtor for the calendar year 1960, and more particularly December, 1960.

The Court: This was his return?

Mr. McNelis: This was his return, your Honor, which had been filed in January, '61, with respect to the business of December, 1960.

Mr. Downing: Is 95 in this group? I don't believe we have that in front of us. That is the 11-C form, isn't it?

Mr. McNelis: 11-C? I will get it.

These should go up to Exhibit 92, I believe, or about 92.

Mr. Downing: No, they go to 89.

The Court: 89, I think is the last one of these.

Mr. McNelis: (Indicating) There are your monthly statements.

Here (indicating) are the applications for the stamp, which are a yearly return, as distinguished from the other, which is a monthly return.

Mr. Downing: Is this the one I am looking at?

The Court: 95 is July 1, 1960, tax return and application for registry. It covers a period—I don't [266] know. I don't see where there is any tax information on 95.

Mr. Downing: I don't, either.

Mr. McNelis: There is no tax information on 95, your Honor.

The significance of this particular return is that we will, of course, have problems of sources of income.

The Court: Yes?

Mr. McNelis: Or the occupation and businesses of the defendant. This is material and relevant with respect to one of his activities, which was income-producing.

The Court: This is July 30, 1960, to June 1, 1961?

Mr. McNelis: It is his application.

Mr. Downing: Well, I see that date of June 2nd, 1960, down here. It ends at June 2, 1960.

The Court: Yes.

Mr. Downing: As to that first part of it, I will withdraw that part of it.

The Court: All right.

Mr. McNelis: This is an income producing activity of the defendant.

[267] The Court: Yes, I understand.

Mr. Downing: The other, which is the major portion of the objection, is that we are not on trial for any evasion or for any failure to file or attempt to evade or defeat any taxes on Forms 740 or 730. We are not on trial for any fraudulent attempt or failure to file Form 11-C, or any false statement, either in Form 730 or 11-C.

The only purpose—the only purpose of putting these in is to muddy the waters here from the standpoint of—

The Court: Is all the evidence on these exhibits covered in Schedule C?

Mr. Downing: That's right.

The Court: Is Schedule C, filed by the defendant?

Mr. McNelis: Your Honor, that is a nice question. My answer right now would be no.

Mr. Downing: Well, we disagree with that. We say that the information is there.

The Court: Well, if you are contending that all of the Government—I mean all of the revenue derived as shown by these forms was not covered by Schedule C on the annual returns, then I think these are admissible. [268] However, if—

Mr. McNelis: I have one other contention, your Honor.

The Court: All right.

Mr. McNelis: Who prepared them? Where did the information come from? Were those made available to the individual preparing the returns?

Mr. Downing: We are not on trial for that.

The Court: I am inclined to agree with the defendant on that.

If they show nothing different than these schedules to the annual forms, then I don't think they are admissible; because the only purpose then, I think, would be to muddy up the waters, I think is the term you used.

Mr. Downing: That is right, your Honor.

The Court: If they show—if it can be shown that there is different tax information on these than is reported on Schedule C of the annual return, then I think they are admissible.

Mr. Downing: I think he should first show—

The Court: But until such time as we have such a showing here, I will reserve the ruling.

Mr. McNelis: Fine, your Honor. Very well.

Mr. Downing: And there will be no statement before the jury about these?

[269] The Court: No. You may go ahead and offer them, just simply—

Mr. Downing: Wait just a minute. Wait just a minute.

The Court: Well, no. He can simply offer them without showing or stating what they are, just as Exhibits 30 through 95.

Mr. Downing: This is a return of the tax on wagering, is all it is, and that is one of the vices permitted by the ruling.

Mr. McNelis: Your Honor, I am willing to forego mentioning about this at this time. The lunch hour will give me time to find out what I need to know.

The Court: All right. Very well.

IN THE UNITED STATES DISTRICT COURT
Northern District Of Indiana
Hammond Division

(Filed August 13, 1968)

FRED T. MACKEY
vs.
UNITED STATES OF AMERICA
} Civil No. 4879

[38] ORDER

Plaintiff Fred T. Mackey having filed a motion for collateral relief from the judgment of this Court in Hammond Criminal No. 3411 pursuant to Title 28 U.S.C. §2255, the Court, finding that the motion, records, and files of this case conclusively show that the petitioner is entitled to no relief, hereby DENIES said motion for the reasons stated in the memorandum to follow.

/s/ George N. Beamer
U. S. District Judge

Enter: August 13, 1968

IN THE UNITED STATES DISTRICT COURT
Northern District Of Indiana
Hammond Division

(Filed September 6, 1968)

FRED T. MACKEY
vs.
UNITED STATES OF AMERICA
} Civil No. 4879

[39] MEMORANDUM

Plaintiff was indicted in March, 1963, for "willfully and knowingly attempt(ing) to evade and defeat a large part of the income tax due and owing by him and his wife for the calendar year(s) of 1956 (through) 1960 by willfully preparing and causing to be prepared * * * false and fraudulent income tax return(s) * * * in violation of section 7201 Internal Revenue Code; 26 U.S.C. Section 7201." He was found guilty by a jury and the conviction affirmed on appeal. *United States* v. *Mackey*, 345 F. 2d 499 (7th Cir. 1965), *cert. den.*, 382 U.S. 824, 15 L. ed. 2d 69 (1965). The Government presented its case on the net worth method—it attempted to show that the petitioner's net worth increased during the subject period in an amount unaccounted for by his reported income and non-taxable sources. A crucial step in prosecuting a case under this method is the establishment of a probable source of the unreported income, in this case "policy" or gambling. One type of proof offered to establish this probable source of unreported income were Government Exhibits 30 through 89, which were monthly gambling excise tax returns, Form 730, required to be filed by one who is subject to the excise tax on wagering.

(Title 26 U.S.C. §4401, Treas. Reg. §44.4011(a)-1(a)). These returns were objected to at the trial on the [40] grounds that they were inflammatory, prejudicial, and irrelevant, but not on the ground that their admission violated the plaintiff's right against self-incrimination. Although the Appellate opinion did not expressly consider these items, it is obvious that they are referred to in the paragraph at 345 F. 2d 499, 507 (7th Cir. 1965) which stated:

> Defendant raises various other issues, inter alia; whether the trial judge properly admitted certain evidence; . . . We have carefully considered these and all other issues raised by defendant and find no prejudicial error.

This constitutes a final ruling on those objections raised at trial and on appeal, and they are not considered here. The plaintiff however, raises a new and serious question with respect to these items: whether their admission violated his privilege against compulsory self-incrimination as guaranteed by the Fifth Amendment to the Constitution.

These returns were filed as a part of a comprehensive system for the taxation of wagering. Title 26 U.S.C. §4401 imposes an excise tax on wagers equal to ten per cent of the amount thereof. Title 26 U.S.C. §4403 provides that every person liable for the tax, meaning those engaged in the business of accepting wagers, shall keep a daily record showing the gross amount of wages. To collect these taxes, Treas. Reg. §44.6011(a)-1(a) requires the taxpayer to submit a Form 730 each month showing the wagers collected, etc. Although not required by the statute, the Internal Revenue Service will not accept the tax without the form. (See *United States* v. *Grosso*,

19 L. ed. 2d 906, 910-11 (1968)). Also part of this same system is the occupational tax on engaging in the business of accepting wagers. Title 26 U.S.C. §§4411-4414.

The effect of these statutes has been severely limited [41] by the decisions of the Supreme Court in *Grosso* v. *United States,* 19 L. ed. 2d 906 (1968); and *Marchetti* v. *United States,* 19 L. ed. 2d 889 (1968). In *Marchetti* the Court held that a plea of compulsory self-incrimination was a bar to prosecution for failure to comply with the wagering occupation tax, and *Grosso* held the same with respect to the wagering excise tax. *Grosso* also held that defendant's failure in that case to raise the Fifth Amendment question, with respect to a charge of failing to pay the occupation tax, did not waive his right against self-incrimination to that Court. There are three salient features of the opinions of importance in this case. A careful examination of the cases shows that the Court based its decisions on the widespread and almost total criminal prohibition against gambling of the type taxed. It found that a defendant subject to the tax was operating in the shadow of criminal penalties imposed by both State and Federal governments. This, coupled with the fact that Congress had provided for disclosure of all information garnered in connection with the occupation tax, and that the Internal Revenue Service revealed excise tax information to law enforcement officers as a matter of policy, led the Court to find that this scheme seriously abridged the gamblers' right against self-incrimination. The Court held, in both cases, that a plea of self-incrimination would be a bar to prosecution. A defendant in a *criminal* prosecution for failure to pay the tax or abide by the ancillary requirements could not be convicted if he stated that to have abided by the requirements would have incriminated him.

Second, the Court did not strike down either tax. In *Marchetti,* it said, at 19 L. ed. 2d 889, 905:

> We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; [42] we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements.

Third, while the Court did not expressly deal with the admissibility of forms and returns filed in compliance with these acts either before or after its decisions, it did, over the vigorous objection of the Chief Justice, refuse to adopt a rule which would prohibit disclosure of information obtained under the acts rather than prohibit punishment for their violation. The Government had suggested prohibiting disclosure in an effort to save the criminal penalties associated with the tax and the Government's ability to collect the tax itself. The Court found that the Congressional purpose in requiring disclosure was so strong that it should not adopt the tendered alternative. In addition, this Court will have to consider the retroactive effect of the principles (although not the rule) adopted, and the possibility that the plaintiff here may have, at some point, waived any privilege with respect to these documents.

The first point is immediately in dispute. Mackey was not charged with violating gambling laws. He was charged with income tax evasion. The fact that the Exhibits in question showed that he was guilty of other criminal activity, not directly relevant to this trial, has already been considered by this court and the Court of Appeals, and will not be reconsidered. That there is no privilege against incriminating oneself by filing income tax re-

turns and keeping required records is too well established to require discussion. That was all these returns were used for in this case. They pointed to a possible source—whether legal or illegal is irrelevant—of income. They showed that the defendant Mackey could have earned [43] more than he reported. It is certain that the Supreme Court would not have jeopardized the gambling tax scheme on the ground that required returns would have incriminated someone of having income or a source of income not reported on his income tax returns. Any possible compulsory self-incrimination involved in filing these returns was simply not relevant to the case at bar. Defendant was not charged with, and was not convicted of, violation of the gambling laws.

Secondly, it is spurious to argue that the information gathered and introduced into evidence was a product of unconstitutional statutes. As stated earlier, the Court did not find these statutes to be unconstitutional. Instead, it held that it was unconstitutional to punish someone for failing to supply the information required by the statutes and attendant regulations. Exhibits 30 through 89 were, therefore, not the fruits of an unconstitutional scheme.

Thirdly, the Court itself refused to find that these returns, once filed, should be made confidential. Of course, in the future a person will not be able to claim that he was compelled to give evidence against himself after he files a return. He could have refused to file a return and the *Marchetti* and *Grosso* decisions would protect him from punishment. The issue here is whether a defendant who filed returns prior to the decisions may claim that he was compelled to do so in violation of his constitutional rights.

There are two basic reasons for the prohibition against self-incrimination and the use of coerced confessions—their unreliability and the sanctity of the individual. They are unreliable because a person under severe physical and/or mental [44] pressures may confess to a crime he did not commit solely to escape the torment imposed by his interrogators. This was the primary policy behind the rule which excluded only coerced confessions while admitting those which were voluntary, even if made without knowledge of one's rights. That rule, of course, has now been supplanted by one which looks not merely to the voluntariness of the confession, but also to the intelligent waiver of the right against self-incrimination. *Miranda* v. *Arizona,* 384 U.S. 436, 16 L. ed. 2d 694 (1966); *Escobedo* v. *Illinois,* 378 U.S. 478, 12 L. ed. 977 (1964). This newer approach looks not only to the trustworthiness of the confession, but also to the rights of the accused and the sanctity of the judicial process. It is based on the belief that the right against self-incrimination is not a mere rule of evidence, but a fundamental liberty afforded to the guilty and innocent alike. These dual considerations are important in determining the effect to be given decisions and rules in this area of the law. (See *Johnson* v. *New Jersey,* 384 U.S. 719, 16 L. ed. 2d 882 (1966)).

In relation to the gambling excise tax returns, there is little danger of their unreliability other than their possible understatement of liability. No one would file a wagering tax return unless he was engaged in wagering because he would incur a tax liability; his activities would become subject to close scrutiny; and he might be prosecuted for a crime which he did not commit. On the other hand, if he is not engaged in wagering, there

is no reason for him to file a return. He is not subject to any "coercion" to confess to crime he has not committed. There is no tax, and there is no penalty for not engaging in wagering or for not filing the return if one is not subject to the tax. It therefore cannot be said that the use of Forms 730 [45] or other evidence of excise tax payment contributes to the unreliability of the fact finding process in a trial for income tax evasion, or even for wagering.

There is also the other, now paramount, policy consideration behind the privilege against self-incrimination —the liberty of citizens and the purity of the Courts. This was obviously the motivating factor behind the decisions in *Marchetti* and *Grosso* because—as has been shown—the coerced confessions in this instance are highly reliable. In *Marchetti* and *Grosso* the Supreme Court was given a singular opportunity to strike directly at the coercion rather than its fruits. In contrast to other decisions, such as *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. ed. 2d 694 (1966); and *Escobedo* v. *Illinois*, 378 U.S. 478, 12 L. ed. 2d 977 (1964) where the Court sought to halt coercion by destroying its value to the interrogator, it had, in the wagering tax system, an opportunity to end the coercion directly. Out of deference to the Congressional purpose, and over the objection of the Chief Justice, the Court found that it was better to bar the criminal penalties for refusing to supply the information rather than limit its use. *Marchetti* v. *United States*, 19 L. ed. 2d 889, 903-05 (1968); *Grosso* v. *United States*, 19 L. ed. 2d 906, 913 (1968). It would be inappropriate for this Court to adopt a rule expressly rejected by the Supreme Court.

This is especially true under these circumstances. While the Supreme Court did not lay down an exclusionary rule, this Court is asked to retroactively transform and apply the principles of *Marchetti* and *Grosso* to a case which had reached a final decision prior to their enunciation.

The Supreme Court itself has been reluctant to give retroactive application to the newer Fifth Amendment rules. In [46] *Johnson* v. *New Jersey*, 384 U.S. 719, 16 L. ed. 2d 992 (1966) it denied retroactive application to the rules concerning right to counsel and warnings of self-incrimination at criminal interrogations. The Court said, at 384 U.S. 719, 728-29; 16 L. ed. 2d 882, 889:

> Finally, we emphasize the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. We gave retroactive effect to *Jackson* v. *Denno*, supra, (378 U.S. 368, 12 L. ed. 2d 908 (1964)) because confessions are likely to be highly persuasive with a jury and if coerced they may well be untrustworthy by their very nature. On the other hand, we denied retroactive application to *Griffin* v. *California*, supra, (380 U.S. 609, 14 L. ed. 2d 106 (1965)) despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand. We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth determining process at trial.

Jackson v. *Denno*, 378 U.S. 609, 12 L. ed. 2d 908 (1964) struck down the New York system of allowing juries to determine the voluntariness of confessions. The rule was made retroactive, despite a previous decision to

the contrary, because of the great danger that jurors may have considered or been influenced by coerced and unreliable confessions even after they determined them to be involuntary. *Tehan* v. *Shoot*, 382 U.S. 406, 15 L. ed. 2d 453 (1966) held that *Griffin* v. *California*, 380 U.S. 609, 14 L. ed. 2d 106 (1965) prohibiting comment on an accused's failure to testify should not be made retroactive because of the states' justified reliance upon previous decisions of the Court and the devastating effect upon thousands of final convictions.

The rule of *Gideon* v. *Wainwright*, 372 U.S. 335, 9 L. ed. 2d 779 (1963) requiring the states to supply counsel to indigent [47] defendants in all felony prosecutions was given retroactive application because the absence of counsel tainted the entire criminal proceeding. On the other hand, the rule of *United States* v. *Wade*, 388 U.S. 218, 18 L. ed. 2d 1149 (1967) and *Gilbert* v. *California*, 388 U.S. 263, 18 L. ed. 2d 1178 (1967) requiring the presence of counsel at pre-trial lineup and identification procedures, was denied retroactive effect in the decision of *Stovall* v. *Denno*, 388 U.S. 293, 18 L. ed. 2d 1199 (1967), because of the drastic effects of retroactivity on numerous final convictions.

In each of the cases cited, the constitutional infirmity had at least some effect on the integrity and validity of the fact finding process. It became a question of weighing that effect against other considerations such as the reliance placed on previous decisions and the danger of clogging lower courts with numerous old and stale cases. In *Linkletter* v. *Walker*, 381 U.S. 618, 14 L. ed. 2d 601 (1965), the Court refused to apply *Mapp* v. *Ohio*, 367 U.S. 643, 6 L. ed. 2d 108 (1961) which prohibited the introduction of illegally seized evidence in state court

proceedings to cases which had become final prior to its decision. It is the archtype of the use of an exclusionary rule to prohibit unconstitutional conduct on the part of law enforcement officers where that conduct did not intrinsically affect the validity of the trial. The fact that physical evidence was illegally seized has no effect on its probative value, but is excluded to prevent police from resorting to illegal seizures.

An examination of these and other cases reveals no instance where the Court has given retroactive application to an exclusionary rule or other Constitutional guarantee where the reliability of the fact finding process had not been jeopardized. [48] The briefs for plaintiff have suggested none. In plaintiff Mackey's trial, the introduction of the wagering tax forms did not jeopardize the integrity of the trial except to the extent that they showed that he was engaged in illegal activities other than that charged. This possibility was raised by Mackey's attorneys at the trial, and apparently on appeal, and both times the Courts held that there was no error.

Finally, there is the possibility that plaintiff waived his rights, if any, to have the items excluded on the ground that their admission violated his rights against compulsory self-incrimination. Neither plaintiff nor his attorneys raised the privilege against self-incrimination at the time of trial. It is not claimed that plaintiff filed the forms or paid the tax under protest. In short, at no time was the question of possible self-incrimination raised with respect to these forms. On the other hand, it is admitted that plaintiff or his counsel did not know of the decisions in *Marchetti* and *Grosso* at the time of trial. The only law on the topic was found in the decisions of *United States* v. *Kahriger*, 345 U.S. 22, 97 L. ed. 754

(1953) and *Lewis* v. *United States,* 348 U.S. 419, 99 L. ed. 475 (1955) which heid that the wagering occupation tax (Title 26 U.S.C. §4411 as opposed to Title 26 U.S.C. §4401, the excise tax involved here) was constitutional and did not violate the privilege against self-incrimination. These decisions were overturned by the decision in *Marchetti* which held that a plea of self-incrimination was at least a bar to prosecution. They are not without some effect, however, because in *Grosso* the Court reversed the defendant's conviction for violating Section 4411 even though he had never raised the constitutional question. The Court [49] stated, at 19 L. ed. 2d 906, 913-14, that the defendant's reliance on the *Kahriger* and *Lewis* decisions precluded considering his silence as a voluntary waiver of his rights. See also *Harris* v. *United States,* 390 U.S. F. 2d 617 (8th Cir. 1968). Plaintiff here argues that he, likewise, cannot be considered to have waived rights which he did not know existed. The situation is not the same, however, because *Kahriger* and *Lewis* did not consider the possibility of self-incrimination involved in the excise tax, but only with respect to the occupation tax. One factor considered in both decisions with respect to the occupation tax was its prospective application. That is, the Court suggested that a person did not incriminate himself of having committed a crime by paying the occupation tax, because he was supposed to pay it before he gambled and not afterwards. See *United States* v. *Kahriger,* 345 U.S. 22, 32-33, 97 L. ed. 754, 763 (1953). The excise tax was different because there no tax was due until the wagers were taken and the crime committed. Paying the wagering tax in most places amounts to the admission of a crime, but no decision has been suggested where this was directly challenged. Therefore, if a defendant had wished to raise the

constitutional question, he would not have been justified in relying on non-existent decisions, but should have raised it at the first instance, either by not paying the tax and raising the issue when prosecuted, or by paying the tax and objecting to the use of the information thus gained. The plaintiff here did neither. He paid the tax and did not, through his attorneys or otherwise, raise the constitutional question at trial. It is therefore held that he waived any right to have the information excluded on the basis of his privilege against self-incrimination.

In conclusion, it is held that the briefs, records and [50] files before the Court conclusively show that plaintiff is entitled to no relief on the ground that his right against self-incrimination was violated because, (1) the Supreme Court's reasons for holding that excise tax form were incriminating are unrelated to their possible use in a trial for income tax evasion; (2) the Supreme Court itself refused to adopt a rule prohibiting their use at trial; (3) the information is not the product of an unconstitutional statute; (4) the principles plaintiff seeks to draw from the recent decisions should not be applied retroactively in this instance, because the admission of the exhibits in question did not impair the integrity of the fact finding process; and (5) the plaintiff waived any right to have the exhibits excluded on the grounds of self-incrimination by not raising it at trial. The plaintiff's petition for relief under Title 28 U.S.C. §2255 is denied.

/s/ George N. Beamer
U. S. District Judge

Enter: September 6, 1968

IN THE UNITED STATES DISTRICT COURT
Northern District Of Indiana
Hammond Division

(Filed September 13, 1968)

FRED T. MACKEY
vs.
UNITED STATES OF AMERICA
} Civil No. 4879

[51] NOTICE OF APPEAL.

Notice is Hereby Given that plaintiff Fred T. Mackey, hereby appeals to the United States Court of Appeals for the Seventh Circuit from the order dated August 13, 1968, denying his motion for collateral relief under Title 28 U.S.C. 2255.

/s/ Robert J. Downing
/s/ William M. Ward
Attorneys for Appellant
Fred T. Mackey
39 South La Salle Street
Chicago, Illinois 60603
ANdover 3-2180

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
(Filed October 16, 1968)

FRED T. MACKEY,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant-Appellee.
No. 17200

[55] STIPULATION TO MAKE COPIES OF EXHIBITS PART OF THE RECORD ON APPEAL.

It Is Hereby Stipulated by and between the parties hereto, through their respective counsel, that the attached fifteen (15) copies of Form 730, Wagering Tax Returns are true and correct copies of fifteen (15) of the sixty (60) Wagering Tax Returns admitted into evidence as Plaintiff's Exhibits 30 through 89 inclusive in the criminal cause entitled *United States* v. *Mackey*, Criminal No. 3411, in the United States District Court for the Northern District of Indiana, Hammond Division. It is further stipulated by and between the parties through their respective counsel that said copies of said exhibits may be made a part of the Record on Appeal in this cause.

/s/ Fred T. Mackey,
Plaintiff-Appellant
By /s/ Robert J. Downing
/s/ William M. Ward
His Attorneys
United States of America,
Defendant-Appellee
By /s/ Alfred R. Uzis

3

Form 730 — Department of the Treasury — Internal Revenue Service

TAX ON WAGERING 3 35046

(Section 3285 of the Internal Revenue Code)

declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature) Fred Mackey (Date) 2-23,1956

(Title) Operator
(Owner, president, partner, member, etc.)

35 1372-P

FRED HACKET
2129 WASHINGTON
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 11,740.10
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$ 1174.01
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 1174.01

MONTH
JANUARY 1956
INDIANAPOLIS

85

Penalty	$
Interest	$
Total due	$ 1174.01

RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue. IMPORTANT.—Follow instructions carefully.

3

Form 730 — Department of the Treasury — Internal Revenue Service

TAX ON WAGERING 4 35006

(Section 3285 of the Internal Revenue Code)

declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature) Fred Mackey (Date) 3-26-56

OPERATOR
(Owner, president, partner, member, etc.)

35 1372-P

FRED HACKET
2129 WASHINGTON
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 11212.30
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$ 1121.23
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 1121.23

MONTH
FEBRUARY 1956
INDIANAPOLIS

85

Penalty	$
Interest	$
Total due	$ 1121.23

RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue. IMPORTANT.—Follow instructions carefully.

5

Form 730 — Department of the Treasury — Internal Revenue Service

TAX ON WAGERING 5 35120

(Section 3285 of the Internal Revenue Code)

declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature) Fred Mackey (Date) 4-19-56

OPERATOR
(Owner, president, partner, member, etc.)

35 1372-P

FRED HACKET
2129 WASHINGTON
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 12,374.60
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$ 1237.48
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 1237.48

MONTH
MARCH 1956
INDIANAPOLIS

83

Penalty	$
Interest	$
Total due	$ 1237.48

RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue. IMPORTANT.—Follow instructions carefully.

56

FORM 730
Treasury Department
Internal Revenue Service

TAX ON WAGERING

(Section 3285 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 5-15-57

(Title) Operator
(Owner, president, partner, member, etc.)

Due to circumstances of which I have no control, this is all for April 1372-P

FRED MACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(USE SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 8525.20
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$ 852.52
5. Less credits (No credit allowed unless supported by evidence. See instructions 4 (a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 852.52

MONTH
APRIL 1957
INDIANAPOLIS
98

Penalty... $
Interest... $
Total due. $ 852.52

ORIGINAL RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue. IMPORTANT.—Follow instructions on back.

FORM 730
Treasury Department
Internal Revenue Service

TAX ON WAGERING

(Section 3285 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 6-5-57

(Title) Operator
(Owner, president, partner, member, etc.)

There was no action during this period.

35 1372-P

FRED MACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(USE SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	00000
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$
5. Less credits (No credit allowed unless supported by evidence. See instructions 4 (a) and (b))	$
6. Net tax due (item 4 less item 5)	$

MONTH
MAY 1957
INDIANAPOLIS
92

Penalty... $
Interest... $
Total due. $ 00000

ORIGINAL RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue. IMPORTANT.—Follow instructions on back.

FORM 730
Treasury Department
Internal Revenue Service

TAX ON WAGERING

(Section 3285 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 7-15-57

(Title) operator
(Owner, president, partner, member, etc.)

35 1372-P

FRED MACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(USE SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 0
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$
5. Less credits (No credit allowed unless supported by evidence. See instructions 4 (a) and (b))	$
6. Net tax due (item 4 less item 5)	$

JUNE 1957
INDIANAPOLIS
101

Penalty... $
Interest... $
Total due. $

ORIGINAL RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue. IMPORTANT.—Follow instructions on back.

730 (Rev. Feb. 1954)
Treasury Department
Internal Revenue Service

TAX ON WAGERING / 3 35251

(Section 4401 of the Internal Revenue Code)

declare under the penalties of perjury that this return (including accompanying certificates and statements) has been examined and to the best of my knowledge and belief is a true, correct, complete return.

(Signed) Fred Mackey (Date) 8-14-58

Operator
(Owner, president, partner, member, etc.)

35 1372-P

FRED MACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$12,354.15
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$1,235.42
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$

MONTH: JULY 1958 INDIANAPOLIS 81

Penalty $
Interest $
Total due $1,235.42

NAL RETURN.—This form must be filed, with remittance, with the District Director of Internal Revenue. IMPORTANT.—Follow instructions carefully. 16-44001-8

FORM 730
Treasury Department
Internal Revenue Service

TAX ON WAGERING 9 35317

(Section 4401 of the Internal Revenue Code)

declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 9-15-58

Operator
(Owner, president, partner, member, etc.)

-1372-P

Fred Mackey 35-1372-P
2129 Washington St.
Gary Ind

(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$12,264.05
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$1,226.41
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$

MONTH: Aug 1958 92

Penalty $
Interest $
Total due $1,226.41

IGINAL RETURN.—This form must be filed, with remittance, with the Collector of Internal Revenue. IMPORTANT.—Follow instructions carefully. 16-44001-8

FORM 730
Treasury Department
Internal Revenue Service

TAX ON WAGERING 10 35324

(Section 4401 of the Internal Revenue Code)

declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 10-15-58

Operator
(Owner, president, partner, member, etc.)

Fred. Mackey 35-1372-P
2129 Washington St.
Gary, Ind

(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$11,980.43
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$1,198.04
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$

FILED WITH REMITTANCE
OCT 16 1958
INDIANAPOLIS

MONTH: September 93

Penalty $
Interest $
Total due $1,198.04

FORM 730 (Rev. Feb. 1955)
U. S. Treasury Department
Internal Revenue Service

TAX ON WAGERING

3 357151

(Section 4401 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 1-15-60

(Title) Operator
(Owner, president, partner, member, etc.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 12,302.20
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3) REV.	$ 1,230.22
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 1,230.22

35 1372-P

FRED MACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

MONTH
DECEMBER, 1959
INDIANAPOLIS
98

Penalty	$
Interest	$
Total due.	$ 1,230.22

ORIGINAL RETURN.—This form must be filed, with remittance, with the District Director of Internal Revenue. IMPORTANT.—Follow instructions carefully.

FORM 730 (Rev. Feb. 1955)
U. S. Treasury Department
Internal Revenue Service

TAX ON WAGERING

12 357419

(Section 4401 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 12-15-59

(Title) OPERATOR
(Owner, president, partner, member, etc.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 6,433.40
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2 DEC 17 1959	$
4. Tax (10 percent of item 3) INT. REV.	$ 643.34
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 643.34

35 1372-P

FRED MACKEY
2129 WASHINGTON ST.,
GARY, IND.

(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

MONTH
NOVEMBER 1959
INDIANAPOLIS
93

Penalty	$
Interest	$
Total due.	$ 643.34

ORIGINAL RETURN.—This form must be filed, with remittance, with the District Director of Internal Revenue. IMPORTANT.—Follow instructions carefully.

FORM 730 (Rev. Feb. 1955)
U. S. Treasury Department
Internal Revenue Service

TAX ON WAGERING

(Section 4401 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signed) Fred Mackey (Date) 11-14-59

(Title) Operator
(Owner, president, partner, member, etc.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$

NO LIBILITY FOR THIS PERIOD

RECEIV
NOV

35 1372-P

FRED MACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

MONTH
OCTOBER 1959
INDIANAPOLIS
92

Penalty	$
Interest	$
Total due.	$

IMPORTANT.—Follow instructions carefully.

(OMIT)

730 (Rev. Feb. 1956)
U. S. Treasury Department
Internal Revenue Service

TAX ON WAGERING

3 357219

(Section 4401 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature) Fred Mackey (Date) 2-15-60

Operator
(Owner, president, partner, member, etc.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 12,402.65
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$ 1,240.30
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 1240.30

35 1372-P

FRED HACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

MONTH
JANUARY 1960
INDIANAPOLIS

114

Penalty	$
Interest	$
Total due.	$ 1,240.30

ORIGINAL RETURN.—This form must be filed, with remittance, with the District Director of Internal Revenue. IMPORTANT.—Follow instructions carefully. 16—64071-6

730 (Rev. Feb. 1956)
U. S. Treasury Department
Internal Revenue Service

TAX ON WAGERING

3 357622

(Section 4401 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature) Fred Mackey (Date) 2-15-60

Operator
(Owner, president, partner, member, etc.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 12,427.91
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$ 1,242.80
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$ 1242.80

35 1372-P

FRED HACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

MONTH
FEBRUARY - 1960
INDIANAPOLIS

119

Penalty	$
Interest	$
Total due.	$ 1,242.80

ORIGINAL RETURN.—This form must be filed, with remittance, with the District Director of Internal Revenue. IMPORTANT.—Follow instructions carefully. 16—64071-6

730 (Rev. Feb. 1956)
Treasury Department
Internal Revenue Service

TAX ON WAGERING

5 357002

(Section 4401 of the Internal Revenue Code)

I declare under the penalties of perjury that this return (including any accompanying certificates and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

(Signature) Fred Mackey (Date) 4-15-60

Operator
(Owner, president, partner, member, etc.)

1. Gross amount of wagers accepted during month (not including lay-offs accepted)	$ 13,400.5
2. Gross amount of lay-off wagers accepted during month (See instruction 3)	$
3. Sum of items 1 and 2	$
4. Tax (10 percent of item 3)	$ 1,340.05
5. Less credits. (No credit allowed unless supported by evidence. See instructions 4(a) and (b))	$
6. Net tax due (item 4 less item 5)	$

35 1372-P

FRED HACKEY
2129 WASHINGTON ST.,
GARY, IND.

730
(THIS SPACE FOR NAME, ADDRESS, AND REGISTRATION NO.)

MONTH
MARCH - 1960
INDIANAPOLIS

127

Penalty	$
Interest	$
Total due.	$ 1,340.05

ORIGINAL RETURN.—This form must be filed, with remittance, with the District Director of Internal Revenue. IMPORTANT.—Follow instructions carefully. 16—64071-6

JUDGMENT

In The

UNITED STATES COURT OF APPEALS

For The Seventh Circuit

Wednesday, June 4, 1969

Before

Hon. Walter J. Cummings, *Circuit Judge*
Hon. Otto Kerner, *Circuit Judge*
Hon. Julius J. Hoffman, *District Judge*

No. 17200
Fred T. Mackey,
Plaintiff-Appellant,
vs.
United States of America,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968 JANUARY SESSION, 1969

No. 17200
FRED T. MACKEY,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

June 4, 1969

Before CUMMINGS and KERNER, *Circuit Judges* and HOFFMAN, *District Judge.*[1]

HOFFMAN, *District Judge.*

The question presented for decision is whether a conviction for income tax evasion should be set aside on collateral attack because the trial court admitted into evidence the defendant's federal gambling tax returns which, the Supreme Court has subsequently held, the defendant could not have been required to file over a timely claim of the privilege against self-incrimination. We conclude that the question must be answered in the negative, and affirm.

Defendant was convicted on March 24, 1964, of five charges of income tax evasion committed by means of false and fraudulent returns for the calendar years 1956 through 1960, in violation of Section 7201, Internal Revenue Code of 1954, 26 U.S.C. Sec. 7201. He was sentenced

[1] Judge Hoffman is sitting by designation from the United States District Court for the Northern District of Illinois.

to concurrent terms of five years imprisonment, and a fine of $10,000, on each count. Upon a prior appeal, this Court affirmed the conviction, 345 F. 2d 499 (1965), and the United States Supreme Court denied certiorari, 382 U.S. 824.

The prosecution proceeded upon a net worth theory, predicated upon a showing that defendant's total assets had increased during the period in question by an amount which could not be accounted for by his reported income. In such a prosecution, "[p]roof of a likely source, from which the jury could reasonably find that the net worth increase sprang," is an essential element of the case. *Holland* v. *United States*, 348 U.S. 121, 138 (1954). As stated upon the prior appeal, "Government's theory was that the source of defendant's excessive net worth increases was a policy wheel operation which defendant admitted conducting and that the excess of $4000 per week . . . was from profits earned by defendant on this operation." 345 F. 2d, at 501. This theory was borne out by the proof. "Defendant concedes that he was a policy wheel operator during the years in question. There was no direct evidence that any of defendant's alleged unreported income was obtained from his policy wheel operation. Direct evidence is not required." 345 F. 2d, at 506-507.

One type of proof establishing this likely source of unreported income was a series of sixty monthly federal gambling excise tax returns filed by defendant during the years in question. These returns, on Form 730, were required to accompany the payment of the ten per cent excise tax on wagering receipts imposed by Section 4401 of the Internal Revenue Code, 26 U.S.C. Sec. 4401; Treas. Reg. Sec. 44.4011(a)-1(a). At the trial, defendant objected to the introduction of these returns on the ground that they were cumulative, since their contents were disclosed by Schedule C to the income tax returns already in evidence, and were prejudicial and inflammatory. The District Court overruled this objection, and this Court affirmed, without specific discussion, finding "no prejudicial error." 345 F. 2d, at 507. In neither court did the defendant claim that the returns infringed his constitutional privilege against self-incrimination. With the de-

nial of certiorari, the judgment became final and defendant began serving his sentence in December, 1965.

On January 29, 1968, the United States Supreme Court handed down its decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, holding that the federal wagering tax laws violated the privilege against self-incrimination, and that a claim of that privilege bars a prosecution for failure to register, report, or pay the taxes imposed by those laws. Immediately thereafter, defendant filed his motion under Section 2255 of the Judicial Code, 28 U.S.C. Sec. 2255, to set aside the judgment of conviction on the authority of these decisions. Defendant has appealed to this Court from the District Court's denial of this motion.

I.

At the threshold, we are met by the Government's argument that proceedings under Section 2255 are not a substitute for a direct appeal, and are not ordinarily available to set aside a final conviction on the ground that evidence was erroneously introduced and admitted. That argument, supported by a number of decisions in other Circuits, has been put to rest by the Supreme Court's decision in *Kaufman* v. *United States*, 394 U.S. ....., 889 S. Ct. 1068 (March 24, 1969). Sustaining a motion under Section 2255 based on the admission of evidence produced by unlawful search and seizure in violation of the Fourth Amendment, the Court concluded broadly that, in enacting the Section, "Congress has determined that the full protection of their constitutional rights requires the availability of a mechanism for collateral attack." 394 U.S., ..., 89 S. Ct., at 1075. Since defendant's claim is premised on the Constitution, his remedy is not foreclosed.

Defendant's motion under Section 2255 rests wholly upon his claim that the reception into evidence of the Form 730 wagering excise tax returns infringed his privilege against self-incrimination conferred by the Fifth Amendment. He did not, however, decline to file the returns, nor did he, when filing them, raise any protest upon that ground. No claim of the privilege was made at the trial, to support his objection to the admissibility

of the exhibits, and no question of self-incrimination was presented to this Court in the course of the prior appeal. These failures to invoke the privilege do not work a waiver, in defendant's view, since his silence resulted from reliance upon the Supreme Court's decisions in *United States* v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955), holding that the wagering taxes did not violate the privilege against self-incrimination. Until these decisions were overruled, after his conviction had become final, by the subsequent decisions in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), the defendant reasons, he had no support for a claim of privilege, and his failure to make the claim must be excused.

As the District Court demonstrates in its closely reasoned opinion, a careful reading of the authorities casts doubt on this attempted justification. The prior decisions in *Kahriger* and *Lewis* involved a different tax from the tax here involved: they held only that the wagering *occupation* tax (26 U.S.C. Sec. 4411), as distinguished from the *excise* tax here in issue (26 U.S.C. Sec. 4401), did not violate the privilege against self-incrimination, in part upon the rationale that the occupation tax, to be paid annually in advance, did not involve any possible incrimination for *past* crimes. See *United States* v. *Kahriger*, 345 U.S. 22, 32-33 (1953). The excise tax, imposed upon wagering receipts after the fact, would not necessarily survive under this rationale, and the defendant in *Grosso* v. *United States*, 390 U.S. 62 (1968), recognized this distinction by raising a plea of self-incrimination to the charge of failure to pay the *excise* tax here involved, but not to the charge of failure to pay the occupation tax considered in *Kahriger* and *Lewis*, where the plea would have been futile. Moreover, as the District Court points out, all four of the Supreme Court decisions involved a failure to file the required returns; none directly adjudicated the admissibility of returns already filed by the defendant without objection.

II.

There is, however, a more fundamental flaw in defendant's motion. To avoid the consequence of waiver from

his failure to claim the privilege, he asserts that the *Marchetti* and *Grosso* decisions worked a marked change in the law. That assertion inevitably presents the question whether those decisions should be applied retroactively, as the standard for review of judgments already final when the new principles were declared, or whether the commands should be confined to prospective application. In a line of cases tracing back to *Linkletter* v. *Walker,* 381 U.S. 618 (1965), the Supreme Court has made it plain that decisions establishing new principles of constitutionality in criminal litigation do not necessarily or automatically apply to cases already closed. The Court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application." 38 U.S., at 628.

Whether the principles of *Marchetti* and *Grosso* are to be retroactively applied has yet to be answered directly by the Supreme Court. The criteria which control the question are nonetheless clearly delineated. The retroactivity or nonretroactivity of the decisions is a function of three considerations: "(a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." *Desist* v. *United States,* 394 U.S. ....., 89 S. Ct. 1030, 1033 (March 24, 1969); *Stovall* v. *Denno,* 388 U.S. 293, 297 (1967); *Johnson* v. *New Jersey,* 384 U.S. 719, 727 (1966).

Foremost among these factors is the purpose to be served by the new constitutional rule. Falling on one side of the line are standards laid down under the Sixth Amendment, intended to protect the integrity of the fact-finding process and the fairness of the trial itself, which have been applied retroactively under this test. Thus denial of the right to counsel in any stage of the judicial proceedings taints the validity of any action taken, and warrants relief against the consequences. See, for example, *Arsenault* v. *Massachusetts,* 393 U.S. 5 (1968) (denial of counsel at preliminary hearing); *McConnell* v. *Rhay,* 393 U.S. 2 (1968) (denial of counsel at hearing on revocation of probation). The right to confront adverse witnesses, similarly guaranteed by the Sixth Amend-

ment, is attended to assure the reliability of findings of fact by subjecting the testimony to cross examination, a purpose which calls for retrospective relief. See *Roberts* v. *Russell*, 393 U.S. 393 (1967) (confession of co-defendant); *Berger* v. *California*, 393 U.S. 314 (1969) (prior testimony of absent witness); *Bates* v. *Nelson*, 393 U.S. 16 (1968). On the other side of the line, the Fourth Amendment's prohibition against unreasonable searches and seizures, and federal anti-wiretapping laws, are intended to preserve privacy, and the resulting exclusionary rules of evidence are adopted not to exclude unreliable evidence but to deter illegal police action. Retroactive application of such exclusionary rules is not justified when the "misconduct of the police * * * has already occurred and will not be corrected by releasing the prisoners involved." *Desist* v. *United States*, 394 U.S. ....., 89 S. Ct. 1030, 1034 (March 24, 1969); *Fuller* v. *Alaska*, 393 U.S. 80 (1968); *Linkletter* v. *Walker*, 381 U.S. 618 (1965).

Within the scope of the Fifth Amendment, the purpose of the Due Process clause to assure fundamental fairness has been held to require retroactivity for rules concerning the presentation of coerced confessions to the jury, *Jackson* v. *Denno*, 378 U.S. 368 (1964), or concerning line-up procedures which are inherently conducive to mistaken identification. *Foster* v. *California*, 394 U.S. ....., 89 S. Ct. 1127, 1128 (March 24, 1969). On the other hand, cases arising under the Fifth Amendment's privilege against self-incrimination involve the congeries of purposes, including the privacy of the individual and the adversary system of adjudication, which that privilege embodies. The "Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. * * * As we pointed out in Linkletter with respect to the Fourth Amendment rights there in question, 'the ruptured privacy . . . cannot be restored.'" *Tehan* v. *Shott*, 382 U.S. 406, 416 (1966). On the basis of these limits of purpose, the Court held that its reinterpretation of the

scope of the privilege against self-incrimination did not warrant retroactive application. The holding is re-confirmed in *Johnson* v. *New Jersey*, 384 U.S. 719 (1966).

Defendant contends, however, that the wagering tax returns constitute coerced confessions, since they were filed under the compulsion of a legal command, and that retroactivity follows automatically once the question is so characterized. But the compulsion which turns interrogation into a violation of the privilege against self-incrimination is not the same as the coercion and intimidation which make a confession involuntary and a denial of Due Process. See, for example, *Davis* v. *North Carolina*, 384 U.S. 737 (1966); *Boulden* v. *Holman*, 394 U.S. ....., 89 S. Ct. 1138, 1139-40 (March 24, 1969). Here there is no suggestion that the defendant's will was overborne, by physical intimidation or coercion, to lead him to a false admission that he was engaged in gambling. The interrogation to which he responded, by filing the wagering tax returns, was addressed to the public at large. Certainly he was subject to a lesser degree of compulsion than a lone defendant singled out by accusation and deprived of personal liberty and support while he is subjected to in custody interrogation by the police. Although such circumstances combine to make the defendant's "statements the product of compulsion" in violation of the policy of the privilege against self-incrimination, as declared in *Miranda* v. *Arizona*, 384 U.S. 436, 466 (1966), the Supreme Court has held that the new rule excluding confessions so compelled is not to be given retroactive effect. *Johnson* v. *New Jersey*, 384 U.S. 719 (1966). The unreliability of the fact-finding process which is the touchstone of retroactivity is simply not threatened by the impersonal command of the wagering tax laws. Cf. *Stovall* v. *Denno*, 388 U.S. 293 (1967) (non-retroactivity of requirement of counsel during line-up procedures); *DiStefano* v. *Woods*, 392 U.S. 631 (1968) (non-retroactivity of jury trial for serious criminal contempts).

In deciding that the purpose of the rules announced in *Marchetti* and *Grosso* (390 U.S. 39 and 62), does not call for retroactivity in the case before us, we do not mean to intimate how the different question of retroactivity

would be decided in other situations. Whether the ruling of *Marchetti* and *Grosso* should be applied retroactively to defendants in the situation of Kahriger and Lewis themselves (345 U.S. 22; 348 U.S. 419), who have claimed the privilege and have been convicted of failure to file the returns, presents considerations not before us, since in such cases recognition of the privilege would negate the very offense for which the defendants are imprisoned. See *Graham* v. *United States,* ..... F. 2d ..... (6th Cir., March 10, 1969), denying retroactivity in that situation. Here the defendant was charged not with failure to file the returns, nor even of a crime of gambling, but of evasion of income taxes. The purpose of the rule of *Marchetti* and *Grosso* has no application to warrant retroactively here. Its object was to protect the individual against self-incrimination under the "comprehensive system of federal and state prohibitions against wagering activities . . ." *Marchetti* v. *United States,* 390 U.S. 39, 48 (1968). If gambling were not a crime, or if defendant had been granted immunity from all gambling prosecutions, he could have claimed no privilege by reason of potential income tax jeopardy against filing the required wagering excise tax returns, any more than against the filing of the income tax return itself. See *United States* v. *Sullivan,* 274 U.S. 259 (1927). In this prosecution, the returns were no more incriminating than a report of any lawful business activity as a likely source of unreported income. Under the circumstances, the purpose of *Marchetti* and *Grosso* is extraneous to the conviction, and does not call for retrospective application.

The factors of reliance and administrative difficulty which control, along with purpose, the prospective or retroactive effect of the new rule lead to the same conclusion of nonretroactivity. An avowed purpose of Congress in enacting the wagering tax system was to provide information to interested prosecuting authorities. *Marchetti* v. *United States,* 390 U.S. 39, 58-59 (1968). This object was aided by the Supreme Court's earlier decisions in *Kahriger* and *Lewis,* sustaining the constitutionality of the scheme. Law enforcement officers were thus expressly invited to make use of the information disclosed, and to abandon their pursuit of evidence through

other channels in reliance upon congressional and judicial approval of this offered source. Retroactivity was denied in *Fuller* v. *Alaska,* 393 U.S. 80 (1968), when the law enforcement officials were guilty of a plain violation of federal laws against wiretapping, and had relied only upon a judicial failure to enforce the laws by excluding the resulting evidence in state courts. Here the evidence was gathered with the blessings of federal law. Reliance was accordingly justified and extensive. "Evidence of the possession of a federal wagering tax stamp or of payment of the wagering taxes, has often been admitted at trial in state and federal prosecutions for gambling offenses; such evidence has doubtless proved useful even more frequently to lead prosecuting authorities to other evidence upon which convictions have subsequently been obtained." *Marchetti* v. *United States,* 390 U.S. 39, 47-48 (1968).

As a result of such reliance, the burdens which would be imposed upon the administration of justice by retroactive application of the ruling would be formidable. The third factor among the criteria of prospective effect is thus also satisfied. With a rule of retroactivity, every gambling conviction could be re-opened upon a claim that disclosures under the federal laws had contributed to the conviction. The rule would require the courts to re-examine the total evidence in each case, and "would necessarily oblige the state [or federal] prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes . . ." *Marchetti* v. *United States,* 390 U.S. 39, 59, (1968). See also *Desist* v. *United States,* 394 U.S. ....., 80 S. Ct. 1030, 1033 (March 24, 1969).

It follows that the District Court correctly denied defendant's motion to set aside the conviction under Section 2255.

Judgment Affirmed.

A true Copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Seventh Circuit.

Supreme Court of the United States

No. 529 ---- , *October Term, 19* 69

Fred T. Mackey,

Petitioner,

v.

United States

ORDER ALLOWING CERTIORARI. Filed December 8 ------ , 19 69.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh ---------- Circuit is granted. The case is placed on the summary calendar and set for oral argument immediately following No. 8.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office-Supreme Court, U
FILED
AUG 2 91969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~529~~ 36

FRED T. MACKEY,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

WILLIAM M. WARD
39 S. LaSalle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner, Fred T. Mackey

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3988

INDEX

PAGE

Opinion Below 2

Jurisdiction 2

Questions Presented For Review 3

Constitutional Provision And Statutes Involved 4

Statement 6

A. Course of proceedings in the Section 2255 case now before this Court 6

B. Relevant facts concerning the underlying conviction for income tax evasion 7

Reason For Granting The Writ 9

A. The Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court 9

B. The Court of Appeals has decided on important questions of federal law which has not been, but should be, settled by this Court 14

Conclusion 15

Appendices:

A—Opinion of the United States Court of Appeals .. 1a

B—Opinion of the United States District Court 10a

C—Judgment of the United States Court of Appeals 23a

List Of Authorities Cited

Cases:

Alberston v. SACB, 382 U.S. 70 10
Greenwood v. United States, 392 F. 2d 558 (1968) 14
Grosso v. United States, 390 U.S. 62 9
Harris v. United States, 8 Cir., 390 F. 2d 616 (1968) 13
Harrison v. United States, 392 U.S. 219 10
Jackson v. Denno, 378 U.S. 368 ..... 10, 11, 13
Jarrell v. Boles (N.D., W.Va., 1967) 272 F. Supp. 755 14
Jenkins v. Delaware, 395 U.S. 213 12
Johnson v. New Jersey, 384 U.S. 719 13
Leary v. United States, 395 U.S. 6 13
Ledbetter v. Warden, 4 Cir., 368 F. 2d 490 (1966), cert. den. 386 U.S. 971 14
Lewis v. United States, 348 U.S. 419 9
Linkletter v. Walker, 381 U.S. 618 13
Malloy v. Hogan, 378 U.S. 1 ..... 10, 12
Marchetti v. United States, 390 U.S. 39 9
Murphy v. Waterfront Commissioners, 378 U.S. 52 .. 10
Tehan v. Shott, 382 U.S. 406 13
United States v. Fay, 2 Cir., 333 F. 2d 12 (1964) 13
United States v. Fincher, 2 Cir., 391 F. 2d 603 (1968) 14
United States v. Kahriger, 345 U.S. 22 9
United States v. Manfredonia, 2 Cir., 391 F. 2d 229 (1968) 14
United States v. Myers, (E.D., Pa., 1967) 276 F. Supp. 748 14
Ziffrin, Inc. v. United States, 318 U.S. 73 13

Others:

Fifth Amendment, United States Constitution 4
28 U.S.C. Sect. 2255 4
28 U.S.C. Sect. 4401 7
Sect. 7201, I.R.C., 1954 4
Treas. Reg. No. 44.6011(a)-1(a) 7
Caplin, 8 Crime & Delin, 371, 372, 373, 378 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. _____

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

---

Fred T. Mackey, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on June 4, 1969.

OPINION BELOW.

The opinion of the Court of Appeals below (Appendix A, *infra*, p. 1a) is reported in 411 F. 2d 504. The opinion of the District Court below (Appendix B, *infra*, p. 10a) was not reported.

JURISDICTION.

The judgment of the Court below (Appendix C, *infra*, p. 23a) was entered on June 4, 1969. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW.

1. Whether this Court's decisions in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, which held that the filing of wagering excise tax returns violate a taxpayer's privilege against self-incrimination must be applied retrospectively in a 28 U.S.C. Sect. 2255 proceeding to a conviction for income tax evasion founded in part upon the admission in evidence of such wagering tax returns.

2. Whether a defendant-taxpayer in a criminal income tax evasion case is deprived of due process of law when his conviction is founded in part upon involuntary confessions of the illegal activity of gambling, and when such illegal activity is admittedly a link in the chain of evidence needed to prosecute and convict in the income tax evasion case.

3. Whether there ever is any justification in law or in fact for a court to refuse to vacate and set aside a criminal conviction after it has become final, when such criminal conviction was obtained in part upon an involuntary and coerced statement which was a link in the chain of evidence needed to prosecute and convict.

4. Whether a failure to claim the privilege against self-incrimination at trial when wagering tax returns were offered in evidence was a waiver of the privilege, where other objection to the admission of the exhibits was made, and where there was no indication or intimation either from the trial record or the state of the law existing at that time that the defendant deliberately designed to knowingly forego a federal constitutional claim.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

1. The Fifth Amendment, United States Constitution.

2. The statute under which Petitioner was prosecuted, though nothing turns on its terms, was Sect. 7201, I.R.C., 1954, which provided as follows:

> "§ 7201. *Attempt To Evade Or Defeat Tax*
>
> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by his title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with costs of prosecution."

3. The statute under which Petitioner sought post conviction relief was 28 U.S.C. Sect. 2255 which provides as follows:

> "§ 2255. *Federal Custody: Remedies On Motion Attacking Sentence*
>
> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> "A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

STATEMENT.

The facts necessary to place in their setting the questions now raised can be briefly stated:

A. Course of proceedings in the Section 2255 case now before this Court.

On January 21, 1964, in a cause then pending in the United States District Court for the Northern District of Indiana, Hammond Division, entitled *United States* v. *Mackey,* Criminal No. 3411, Petitioner was found guilty by a jury on an indictment of five counts charging violations of 26 U.S.C. 7201, 1954 Internal Revenue Code, for the years 1956 through 1960 (App. 2).[1]

On March 24, 1964, the District Court entered judgment and Petitioner was sentenced to five years imprisonment on each count to run concurrently, and was fined $10,000.00 on each count. This judgment and sentence was affirmed by the Court of Appeals for the Seventh Circuit, *United States* v. *Mackey,* No. 14584, 345 F. 2d 499 (1965)[2] and a petition to this Court for a Writ of Certiorari thereto was denied (382 U.S. 824). Petitioner was serving his sentence when the motion under Section 2255 was filed in the District Court. He is presently released on parole.

On February 12, 1968, Petitioner filed the motion in the case at bar under 28 U.S.C. 2255 to vacate and set

---

[1] All citations following unless otherwise indicated are to the Appellant's Appendix in the Court of Appeals in the Sect. 2255 appeal contained in the transcript of record filed herewith.

[2] The certified record on appeal and briefs in that case have been filed in this Court with this Petition.

aside his judgment of conviction (App. 2-22). No answer thereto was required by the District Court or filed by the Government. Briefs in support and opposition were filed by each of the parties. No hearing was held.

On August 13, 1968, the District Court entered its order denying the Motion under 28 U.S.C. Sect. 2255 (App. 22). On September 6, 1968, the District Court issued its Memorandum in support of this order (Appendix B, *infra.*).

On September 13, 1968, Petitioner filed his Notice of Appeal (App. 51). On October 16, 1968 the parties filed in the Court of Appeals a Stipulation containing 15 copies of the 60 Form 730, Wagering Tax Returns which are in issue in this cause (App. 36-41).

B. Relevant facts concerning the underlying conviction for income tax evasion.

The relevant facts are contained in Petitioner's Motion under 28 U.S.C. Section 2255 (App. 2-21). During Petitioner's criminal trial in the District Court, the Government offered as Government's exhibits 30 thru 89 inclusive, sixty (60) monthly Form 730 wagering excise tax returns previously filed by Mackey pursuant to 28 U.S.C. Sect. 4401 and Treas. Reg. No. 44.6011(a)-1(a) (App. 3; 7-19; 36-41). Petitioner objected to the admission of these returns on the grounds they were offered for the purpose of inflammatory prejudice and bias and for the purpose of getting something into evidence that the Government had otherwise not been able to do (App. 7; 15).

The District Court below characterized these exhibits as "somewhat inflammatory" (App. 13) but admitted the returns (App. 14). The Government then argued to the jury that these returns showed a likely source of income (App. 20-21), and in the Court of Appeals on appeal in the criminal case argued that the admission of these returns "constituted a part of the Government's case on the important issue of a likely source of unreported taxable income" (App. 4; p. 43 of Government's Brief in the Court of Appeals in *U. S.* v. *Mackey,* No. 14584). The District Court below in disposing of Petitioner's motion under Sect. 2255 held that the establishment of a likely source of unreported income was a "crucial step" in prosecuting Petitioner (Appendix B, *infra,* p. 10a).

The trial lasted seven weeks. The jury deliberated five days, averaging more than twelve hours a day (Petitioner's Brief in the Court of Appeals in No. 14584, p. 3).

One important point needs noting here. The Court of Appeals below noted (Appendix A, *infra,* p. 2a) that upon the prior appeal, that Court stated: "Defendant concedes that he was a policy wheel operator during the years in question." This concession was made in briefs and argument in the Court of Appeals on appeal in the criminal case. Petitioner rested at the close of the Government's case in the tax evasion trial. The only statement made to the jury by the Petitioner about "policy" was in final argument to the jury in an effort to blunt the prejudicial effect of the admission of the wagering tax returns (Appellant's Appendix in No. 14584, Vol. IV, p. 1908-1910).

REASON FOR GRANTING THE WRIT.

A.

The Court of Appeals has decided a federal question in a way in conflict with the applicable decisions of this Court.

This is a coerced confession case. At the time of Petitioner's criminal trial, this Court had previously held that the filing of the wagering excise tax returns was not protected by the privilege against self-incrimination: *United States* v. *Kahriger,* 345 U.S. 22 and *Lewis* v. *United States,* 348 U.S. 419. After Petitioner's conviction had become final, this Court overruled these decisions and held that the statute which compelled taxpayers to file wagering excise tax returns provided the Government with evidence for use in criminal investigations and prosecutions, and thus violated a taxpayer's privilege against self-incrimination, *Marchetti* v. *U. S.,* 390 U. S. 39; *Grosso* v. *United States,* 390 U.S. 62. In *Marchetti* (p. 48), this Court took note of statements of former Commissioner Caplin (8 Crime & Delin, 371, 372, 373, 378) that the I.R.S. used information obtained pursuant to the wagering tax statutes to obtain convictions for evasion of income taxes as well as wagering taxes. Of course, the wagering tax returns were admitted in evidence in the case at bar.

It was conceded by the Government that the admission of these sixty wagering tax returns was to show a likely source of unreported income, and constituted an important part of the Government's case on this issue (p. 8, *supra.*). The District Court, in these Sect. 2255 proceedings, further conceded that the question of wheth-

er the admission of these returns violated the privilege against self-incrimination "raises a new and serious question" (Appendix B, *infra*, p. 11a). Neither Court below questioned that these returns constituted a link in the chain of evidence needed to convict Petitioner.

Thus, in view of the fact that these returns constituted a link in the chain of evidence needed to convict, they fall within the protection of the privilege even if they do not constitute an express confession or admission of all of the elements of the crime charged, i.e. income tax evasion; *Harrison* v. *United States*, 392 U.S. 219; *Malloy* v. *Hogan*, 378 U.S. 1; *Albertson* v. *SACB*, 382 U.S. 70; *Murphy* v. *Waterfront Commissioners*, 378 U.S. 52.

It is also settled that the truth of these admissions of gambling does not remove them from the protection of the privilege, for "a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, and even though there is ample evidence aside from the confession to support the conviction"; *Jackson* v. *Denno*, 378 U.S. 368, 376.

In reaching its decision to affirm, the Court below decided that these settled principles were not to be applied to the case at bar because a.) Mackey's confessions of gambling were truthful and his will was not overborne by physical coercion or intimidation (Appendix A, *infra*, p. 7a), and b.) this Court's recent decisions delineating the criteria to be followed in determining retrospectivity in other types of constitutional case prohibit retrospectivity in the case at bar (Appendix A, *infra*, p. 4a *et seq.*), and c.) Petitioner waived the privilege by not claiming it at trial (Appendix A, *infra*, p. 3a *et seq.*).

We respectfully urge that this decision is erroneous and at variance with this Court's decisions in the following respects:

a.) The truthful statement and no coercion reason for affirming.

We believe this is the heart of the Court of Appeal's decision (Appendix A, *infra*, p. 7a). Such reasoning not only is at variance with this Court's decisions, e.g. *Jackson* v. *Denno*, 378 U.S. 368, but it is a retreat through the long agonizing history of the privilege to the bloody struggles between the Stuarts and Parliament in the 17th Century. This argument, i.e., that the statement may be used because it is in any event truthful, has always been the justification for the use of a coerced confession. It was the justification for Star Chamber and the oath *ex officio*. It was the justification for *auto da fe*, the rack and the stake. For why would a person confess unless he was telling the truth?

True it is that Petitioner was not tortured or racked. These were 17th Century methods. But Petitioner was coerced in the more civilized but not less effective ways of the 20th Century. For it is a simple fact as noted by this Court in *Marchetti* and *Grosso*, that had Petitioner not filed the wagering tax returns admitted in evidence against him, *he faced imprisonment and heavy fines as a punishment for such a failure*. Thus, he faced imprisonment for not filing the returns, and went to prison because he did file the returns. To say that Petitioner was not coerced or intimidated into filing the wagering tax returns is simply unreal. And, as reaffirmed by this Court in *Jackson* v. *Denno*, 378 U.S. 368, 376, the question of whether these returns were true or false is quite irrelevant to the question of whether his conviction must

now be reversed because of the use of these coerced confessions. What is decisive is that in the case at bar, the Government punished Petitioner by the use of evidence produced not by its own independent labor, but by the cruel simple expedient of compelling it from his own mouth; *Malloy* v. *Hogan*, 378 U.S. 1, 8.

b.) The non-retrospectivity reason for affirming.

We deem it unnecessary to outline in this petition the entire thrust of this Court's recent decisions concerning retrospectivity. It is sufficient to say that this case is not a case involving in-custody interrogation procedures. It is not a case wherein improved police procedures and methods are sought. It is not a case wherein federal constitutional protections at trial are now to be fastened upon the States. This case is not a *Miranda* or *Escobedo* type of situation where intimidation or coercion is not in fact found, but in-custody admissions are held to be inadmissible because of improper police or interrogation procedures.

These type of cases are new cases, but the case at bar is an ancient case. We respectfully believe that the Court of Appeals below, in struggling with the complexities of the new, failed to recognize what was both ancient and settled.

On June 2, 1969, this Court decided *Jenkins* v. *Delaware*, 395 U.S. 213, and again denied retrospectivity in the case before it. But this Court very carefully pointed out (p. 221) that "an individual who cannot claim the benefits of *Miranda* may still resort to whatever state and federal procedures are available to insure that statements admitted against him were made voluntarily." In the numerous retrospectivity cases recently before it,

this Court has always been careful to mark out and define this area as always subject to retrospective application; *Johnson* v. *New Jersey*, 384 U.S. 719, 730; *Linkletter* v. *Walker*, 381 U.S. 618, 638; *Jackson* v. *Denno*, 378 U.S. 368; *Tehan* v. *Shott*, 382 U.S. 406, 415-416.

Thus, the criteria relied upon by the Court below (Appendix A, pp. 4a-9a) for denying retrospectivity have no relevance to the case at bar. Because the conviction of Petitioner is based in part upon involuntary and coerced admissions which were a link in the chain of evidence needed to convict, the conviction must be set aside.

c.) The waiver of privilege at trial reason for affirming.

In its opinion (Appendix A, p. 3-4), the Court of Appeals seems to hold that the failure of Petitioner to claim the privilege at trial would be a sufficient ground upon which to affirm. This is clearly erroneous in light of this Court's recent decision in *Leary* v. *United States*, 395 U.S. 6, 27-28; cf. *Harris* v. *United States*, 8 Cir., 390 F. 2d 616 (1968); *United States* v. *Fay*, 2 Cir., 333 F. 2d 12, 16 (1964); *Ziffrin, Inc.* v. *United States*, 318 U.S. 73, 78. Both Courts below, reasoning very closely, decided that *Kahriger* and *Lewis* only decided the *occupation* taxes aspect of the gambling tax scheme and left the *wagering* tax aspect open. Thus, they decide that Petitioner had a privilege which he should and could have raised to the use of the wagering tax returns. This is very close after-the-fact reasoning concerning a constitutional claim. Petitioner can find no other authority which has so limited the thrust of *Kahriger* and *Lewis*.

The Solicitor General of the United States believed that *Kahriger* and *Lewis* covered the wagering tax aspect

of the gambling tax scheme and so argued in this Court; *Brief of the United States, Grosso* v. *United States*, No. 12, Oct. Term, 1967, p. 17. Other courts have held *Kahriger* and *Lewis* to apply to wagering tax returns; *U. S.* v. *Fincher*, 2 Cir., 391 F. 2d 603, 604 (1968); *U. S.* v. *Manfredonia*, 2 Cir., 391 F. 2d 229 (1968); *Greenwood* v. *U. S.*, 4 Cir., 392 F. 2d 558 (1968).

Thus, it has been universally conceded that Petitioner legally had no privilege at trial which he could invoke. But of equal importance is the *fact* that he did not knowingly waive a privilege which he fairly believed he did not have. In order to waive a constitutional right at trial, there must be a deliberate design, or a strategic trial choice, to forego the federal constitutional claim; *Ledbetter* v. *Warden*, 4 Cir., 368 F. 2d 490 (1966), cert. den. 386 U.S. 971; cf. *Jarrell* v. *Boles* (N.D., W.Va., 1967) 272 F. Supp. 755; *U. S.* v. *Myers*, (E.D., Pa., 1967) 276 F. Supp. 748. It certainly cannot be argued that Petitioner or his counsel deliberately allowed these Forms 730 in evidence as a deliberate design or a strategic trial choice. Their admission was vigorously objected to on the grounds they would prejudice the jury. Given the state of the law as laid down in *Kahriger* and *Lewis*, this was the only reasonable objection that could be made to their admission at that time.

B.

The Court of Appeals has decided on important questions of federal law which has not been, but should be, settled by this Court.

The Court of Appeals below (Appendix A, p. 5a) noted that whether the principles in *Marchetti* and *Grosso* are to be retroactively applied has yet to be answered di-

ctly by the Supreme Court. We do not paint with that oad a brush, because, as that Court further notes, the se of a person who was convicted for failure to file wagering tax return is not before this Court on this etition. But in a larger sense, we present to this Court more fundamental question for review, i.e., can a conction which is admittedly based in part upon a coerced nfession of an illegal activity which is a link in the ain of evidence needed to convict be allowed to stand. his Court has always held in the negative, and we ink it important that this Court reiterate this prinple by making *Marchetti* and *Grosso* retroactive in this se.

CONCLUSION.

The judgment below is a unique and salutory depare from decisions of this Court which require that nvictions based upon coerced statements be set aside any time after conviction. As such, it represents a each in the wall erected by the Fifth Amendment to e Constitution and the decisions of this Court which re designed to protect a citizen from being convicted his Government through the use of statements involarily wrung from him. This petition for a writ of cerrari should therefore be granted.

Respectfully submitted,

WILLIAM M. WARD
39 S. LaSalle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner,
Fred T. Mackey

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1968 JANUARY SESSION, 1969

No. 17200
FRED T. MACKEY,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

June 4, 1969

Before CUMMINGS and KERNER, *Circuit Judges* and HOFFMAN, *District Judge.*[1]

HOFFMAN, *District Judge.*

The question presented for decision is whether a conviction for income tax evasion should be set aside on collateral attack because the trial court admitted into evidence the defendant's federal gambling tax returns which, the Supreme Court has subsequently held, the defendant could not have been required to file over a timely claim of the privilege against self-incrimination. We conclude that the question must be answered in the negative, and affirm.

Defendant was convicted on March 24, 1964, of five charges of income tax evasion committed by means of false and fraudulent returns for the calendar years 1956 through 1960, in violation of Section 7201, Internal Revenue Code of 1954, 26 U.S.C. Sec. 7201. He was sentenced

[1] Judge Hoffman is sitting by designation from the United States District Court for the Northern District of Illinois.

to concurrent terms of five years imprisonment, and a fine of $10,000, on each count. Upon a prior appeal, this Court affirmed the conviction, 345 F. 2d 499 (1965), and the United States Supreme Court denied certiorari, 382 U.S. 824.

The prosecution proceeded upon a net worth theory, predicated upon a showing that defendant's total assets had increased during the period in question by an amount which could not be accounted for by his reported income. In such a prosecution, "[p]roof of a likely source, from which the jury could reasonably find that the net worth increase sprang," is an essential element of the case. *Holland* v. *United States,* 348 U.S. 121, 138 (1954). As stated upon the prior appeal, "Government's theory was that the source of defendant's excessive net worth increases was a policy wheel operation which defendant admitted conducting and that the excess of $4000 per week . . . was from profits earned by defendant on this operation." 345 F.2d, at 501. This theory was borne out by the proof. "Defendant concedes that he was a policy wheel operator during the years in question. There was no direct evidence that any of defendant's alleged unreported income was obtained from his policy wheel operation. Direct evidence is not required." 345 F.2d, at 506-507.

One type of proof establishing this likely source of unreported income was a series of sixty monthly federal gambling excise tax returns filed by defendant during the years in question. These returns, on Form 730, were required to accompany the payment of the ten per cent excise tax on wagering receipts imposed by Section 4401 of the Internal Revenue Code, 26 U.S.C. Sec. 4401; Treas. Reg. Sec. 44.4011(a)-1(a). At the trial, defendant objected to the introduction of these returns on the ground that they were cumulative, since their contents were disclosed by Schedule C to the income tax returns already in evidence, and were prejudicial and inflammatory. The District Court overruled this objection, and this Court affirmed, without specific discussion, finding "no prejudicial error." 345 F.2d, at 507. In neither court did the defendant claim that the returns infringed his constitutional privilege against self-incrimination. With the de-

nial of certiorari, the judgment became final and defendant began serving his sentence in December, 1965.

On January 29, 1968, the United States Supreme Court handed down its decisions in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, holding that the federal wagering tax laws violated the privilege against self-incrimination, and that a claim of that privilege bars a prosecution for failure to register, report, or pay the taxes imposed by those laws. Immediately thereafter, defendant filed his motion under Section 2255 of the Judicial Code, 28 U.S.C. Sec. 2255, to set aside the judgment of conviction on the authority of these decisions. Defendant has appealed to this Court from the District Court's denial of this motion.

I.

At the threshold, we are met by the Government's argument that proceedings under Section 2255 are not a substitute for a direct appeal, and are not ordinarily available to set aside a final conviction on the ground that evidence was erroneously introduced and admitted. That argument, supported by a number of decisions in other Circuits, has been put to rest by the Supreme Court's decision in *Kaufman* v. *United States,* 394 U.S. ....., 889 S. Ct. 1068 (March 24, 1969). Sustaining a motion under Section 2255 based on the admission of evidence produced by unlawful search and seizure in violation of the Fourth Amendment, the Court concluded broadly that, in enacting the Section, "Congress has determined that the full protection of their constitutional rights requires the availability of a mechanism for collateral attack." 394 U.S., at ....., 89 S. Ct., at 1075. Since defendant's claim is premised on the Constitution, his remedy is not foreclosed.

Defendant's motion under Section 2255 rests wholly upon his claim that the reception into evidence of the Form 730 wagering excise tax returns infringed his privilege against self-incrimination conferred by the Fifth Amendment. He did not, however, decline to file the returns, nor did he, when filing them, raise any protest upon that ground. No claim of the privilege was made at the trial, to support his objection to the admissibility of the exhibits, and no question of self-incrimination was presented to this Court in the course of the prior ap-

peal. These failures to invoke the privilege do not work a waiver, in defendant's view, since his silence resulted from reliance upon the Supreme Court's decisions in *United States* v. *Kahriger*, 345 U.S. 22 (1953), and *Lewis* v. *United States*, 348 U.S. 419 (1955), holding that the wagering taxes did not violate the privilege against self-incrimination. Until these decisions were overruled, after his conviction had become final, by the subsequent decisions in *Marchetti* v. *United States*, 390 U.S. 39 (1968), and *Grosso* v. *United States*, 390 U.S. 62 (1968), the defendant reasons, he had no support for a claim of privilege, and his failure to make the claim must be excused.

As the District Court demonstrates in its closely reasoned opinion, a careful reading of the authorities casts doubt on this attempted justification. The prior decisions in *Kahriger* and *Lewis* involved a different tax from the tax here involved: they held only that the wagering *occupation* tax (26 U.S.C. Sec. 4411), as distinguished from the *excise* tax here in issue (26 U.S.C. Sec. 4401), did not violate the privilege against self-incrimination, in part upon the rationale that the occupation tax, to be paid annually in advance, did not involve any possible incrimination for *past* crimes. See *United States* v. *Kahriger*, 345 U.S. 22, 32-33 (1953). The excise tax, imposed upon wagering receipts after the fact, would not necessarily survive under this rationale, and the defendant in *Grosso* v. *United States*, 390 U.S. 62 (1968), recognized this distinction by raising a plea of self-incrimination to the charge of failure to pay the *excise* tax here involved, but not to the charge of failure to pay the occupation tax considered in *Kahriger* and *Lewis*, where the plea would have been futile. Moreover, as the District Court points out, all four of the Supreme Court decisions involved a failure to file the required returns; none directly adjudicated the admissibility of returns already filed by the defendant without objection.

II.

There is, however, a more fundamental flaw in defendant's motion. To avoid the consequence of waiver from his failure to claim the privilege, he asserts that the *Marchetti* and *Grosso* decisions worked a marked change in the law. That assertion inevitably presents the ques-

ion whether those decisions should be applied retroctively, as the standard for review of judgments aleady final when the new principles were declared, or vhether the commands should be confined to prospective pplication. In a line of cases tracing back to *Linkletter* . *Walker,* 381 U.S. 618 (1965), the Supreme Court has nade it plain that decisions establishing new principles f constitutionality in criminal litigation do not necesarily or automatically apply to cases already closed. The Court may in the interest of justice make the rule rospective . . . where the exigencies of the situation require such an application." 38 U.S., at 628.

Whether the principles of *Marchetti* and *Grosso* are to e retroactively applied has yet to be answered directly y the Supreme Court. The criteria which control the uestion are nonetheless clearly delineated. The retroctivity or nonretroactivity of the decisions in a funcion of three considerations: "(a) the purpose to be erved by the new standards, (b) the extent of the reiance by law enforcement authorities on the old standrds, and (c) the effect on the administration of justice f a retroactive application of the new standards." *Desist . United States,* 394 U.S. ....., 89 S. Ct. 1030, 1033 March 24, 1969); *Stovall* v. *Denno,* 388 U.S. 293, 297 1967); *Johnson* v. *New Jersey,* 384 U.S. 719, 727 (1966). Foremost among these factors is the purpose to be erved by the new constitutional rule. Falling on one side f the line are standards laid down under the Sixth Amendment, intended to protect the integrity of the factinding process and the fairness of the trial itself, which ave been applied retroactively under this test. Thus enial of the right to counsel in any stage of the judicial roceedings taints the validity of any action taken, and arrants relief against the consequences. See, for exmple, *Arsenault* v. *Massachusetts,* 393 U.S. 5 (1968) denial of counsel at preliminary hearing); *McConnell . Rhay,* 393 U.S. 2 (1968) (denial of counsel at hearing n revocation of probation). The right to confront adverse witnesses, similarly guaranteed by the Sixth Amendnent, is attended to assure the reliability of findings of act by subjecting the testimony to cross examination, purpose which calls for retrospective relief. See *Roberts*

v. *Russell,* 393 U.S. 393 (1967) (confession of co-defendant); *Berger* v. *California,* 393 U.S. 314 (1969) (prior testimony of absent witness); *Bates* v. *Nelson,* 393 U.S. 16 (1968). On the other side of the line, the Fourth Amendment's prohibition against unreasonable searches and seizures, and federal anti-wiretapping laws, are intended to preserve privacy, and the resulting exclusionary rules of evidence are adopted not to exclude unreliable evidence but to deter illegal police action. Retroactive application of such exclusionary rules is not justified when the "misconduct of the police * * * has already occurred and will not be corrected by releasing the prisoners involved." *Desist* v. *United States,* 394 U.S. ....., 89 S. Ct. 1030, 1034 (March 24, 1969); *Fuller* v. *Alaska,* 393 U.S. 80 (1968); *Linkletter* v. *Walker,* 381 U.S. 618 (1965).

Within the scope of the Fifth Amendment, the purpose of the Due Process clause to assure fundamental fairness has been held to require retroactivity for rules concerning the presentation of coerced confessions to the jury, *Jackson* v. *Denno,* 378 U.S. 368 (1964), or concerning line-up procedures which are inherently conducive to mistaken identification. *Foster* v. *California,* 394 U.S. ....., 89 S. Ct. 1127, 1128 (March 24, 1969). On the other hand, cases arising under the Fifth Amendment's privilege against self-incrimination involve the congeries of purposes, including the privacy of the individual and the adversary system of adjudication, which that privilege embodies. The "Fifth Amendment's privilege against self-incrimination is not an adjunct to the ascertainment of truth. That privilege, like the guarantees of the Fourth Amendment, stands as a protection of quite different constitutional values—values reflecting the concern of our society for the right of each individual to be let alone. * * * As we pointed out in Linkletter with respect to the Fourth Amendment rights there in question, 'the ruptured privacy . . . cannot be restored.'" *Tehan* v. *Shott,* 382 U.S. 406, 416 (1966). On the basis of these limits of purpose, the Court held that its reinterpretation of the scope of the privilege against self-incrimination did not warrant retroactive application. The holding is re-confirmed in *Johnson* v. *New Jersey,* 384 U.S. 719 (1966).

(Opinion of the United States Court of Appeals)

Defendant contends, however, that the wagering tax returns constitute coerced confessions, since they were filed under the compulsion of a legal command, and that retroactivity follows automatically once the question is so characterized. But the compulsion which turns interrogation into a violation of the privilege against self-incrimination is not the same as the coercion and intimidation which make a confession involuntary and a denial of Due Process. See, for example, *Davis* v. *North Carolina,* 384 U.S. 737 (1966); *Boulden* v. *Holman,* 394 U.S. ....., 89 S. Ct. 1138, 1139-40 (March 24, 1969). Here there is no suggestion that the defendant's will was overborne, by physical intimidation or coercion, to lead him to a false admission that he was engaged in gambling. The interrogation to which he responded, by filing the wagering tax returns, was addressed to the public at large. Certainly he was subject to a lesser degree of compulsion than a lone defendant singled out by accusation and deprived of personal liberty and support while he is subjected to in custody interrogation by the police. Although such circumstances combine to make the defendant's "statements the product of compulsion" in violation of the policy of the privilege against self-incrimination, as declared in *Miranda* v. *Arizona,* 384 U.S. 436, 466 (1966), the Supreme Court has held that the new rule excluding confessions so compelled is not to be given retroactive effect. *Johnson* v. *New Jersey,* 384 U.S. 719 (1966). The unreliability of the fact-finding process which is the touchstone of retroactivity is simply not threatened by the impersonal command of the wagering tax laws. Cf. *Stovall* v. *Denno,* 388 U.S. 293 (1967) (non-retroactivity of requirement of counsel during line-up procedures); *DiStefano* v. *Woods,* 392 U.S. 631 (1968) (non-retroactivity of jury trial for serious criminal contempts).

In deciding that the purpose of the rules announced in *Marchetti* and *Grosso* (390 U.S. 39 and 62), does not call for retroactivity in the case before us, we do not mean to intimate how the different question of retroactivity would be decided in other situations. Whether the ruling of *Marchetti* and *Grosso* should be applied retroactively to defendants in the situation of Kahriger and Lewis themselves (345 U.S. 22; 348 U.S. 419), who have claimed the privilege and have been convicted of failure to file

the returns, presents considerations not before us, since in such cases recognition of the privilege would negate the very offense for which the defendants are imprisoned. See *Graham* v. *United States,* ..... F. 2d ..... (6th Cir., March 10, 1969), denying retroactivity in that situation. Here the defendant was charged not with failure to file the returns, nor even of a crime of gambling, but of evasion of income taxes. The purpose of the rule of *Marchetti* and *Grosso* has no application to warrant retroactively here. Its object was to protect the individual against self-incrimination under the "comprehensive system of federal and state prohibitions against wagering activities . . ." *Marchetti* v. *United States,* 390 U.S. 39, 48 (1968). If gambling were not a crime, or if defendant had been granted immunity from all gambling prosecutions, he could have claimed no privilege by reason of potential income tax jeopardy against filing the required wagering excise tax returns, any more than against the filing of the income tax return itself. See *United States* v. *Sullivan,* 274 U.S. 259 (1927). In this prosecution, the returns were no more incriminating than a report of any lawful business activity as a likely source of unreported income. Under the circumstances, the purpose of *Marchetti* and *Grosso* is extraneous to the conviction, and does not call for retrospective application.

The factors of reliance and administrative difficulty which control, along with purpose, the prospective or retroactive effect of the new rule lead to the same conclusion of nonretroactivity. An avowed purpose of Congress in enacting the wagering tax system was to provide information to interested prosecuting authorities. *Marchetti* v. *United States,* 390 U.S. 39, 58-59 (1968). This object was aided by the Supreme Court's earlier decisions in *Kahriger* and *Lewis,* sustaining the constitutionality of the scheme. Law enforcement officers were thus expressly invited to make use of the information disclosed, and to abandon their pursuit of evidence through other channels in reliance upon congressional and judicial approval of this offered source. Retroactivity was denied in *Fuller* v. *Alaska,* 393 U.S. 80 (1968), when the law enforcement officials were guilty of a plain violation of federal laws against wiretapping, and had relied only upon a judicial failure to enforce the laws by

excluding the resulting evidence in state courts. Here the evidence was gathered with the blessings of federal law. Reliance was accordingly justified and extensive. "Evidence of the possession of a federal wagering tax stamp, or of payment of the wagering taxes, has often been admitted at trial in state and federal prosecutions for gambling offenses; such evidence has doubtless proved useful even more frequently to lead prosecuting authorities to other evidence upon which convictions have subsequently been obtained.'" *Marchetti* v. *United States* 390 U.S. 39, 47-48 (1968).

As a result of such reliance, the burdens which would be imposed upon the administration of justice by retroactive application of the ruling would be formidable. The third factor among the criteria of prospective effect is thus also satisfied. With a rule of retroactivity, every gambling conviction could be re-opened upon a claim that disclosures under the federal laws had contributed to the conviction. The rule would require the courts to re-examine the total evidence in each case, and "would necessarily oblige the state [or federal] prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes . . ." *Marchetti* v. *United States,* 390 U.S. 39, 59, (1968). See also *Desist* v. *United States,* 394 U.S. ....., 80 S. Ct. 1030, 1033 (March 24, 1969).

It follows that the District Court correctly denied defendant's motion to set aside the conviction under Section 2255.

Judgment Affirmed.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Opinion of the District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

FRED T. MACKEY
vs.
UNITED STATES OF AMERICA
} Civil No. 4879

MEMORANDUM

Plaintiff was indicted in March, 1963, for "willfully and knowingly attempt(ing) to evade and defeat a large part of the income tax due and owing by him and his wife for the calendar year(s) of 1956 (through) 1960 by willfully preparing and causing to be prepared • • • false and fraudulent income tax return(s) • • • in violation of section 7201 Internal Revenue Code; 26 U.S.C. Section 7201." He was found guilty by a jury and the conviction affirmed on appeal. *United States* v. *Mackey*, 345 F.2d 499 (7th Cir. 1965), *cert. den.*, 382 U.S. 824, 15 L. ed. 2d 69 (1965). The Government presented its case on the net worth method—it attempted to show that the petitioner's net worth increased during the subject period in an amount unaccounted for by his reported income and non-taxable sources. A crucial step in prosecuting a case under this method is the establishment of a probable source of the unreported income, in this case "pol-

icy" or gambling. One type of proof offered to establish this probable source of unreported income were Government Exhibits 30 through 89, which were monthly gambling excise tax returns, Form 730, required to be filed by one who is subject to the excise tax on wagering. (Title 26 U.S.C. §4401, Treas. Reg. §44.4011(a)-1(a)). These returns were objected to at trial on the grounds that they were inflammatory, prejudicial, and irrelevant, but not on the ground that their admission violated the plaintiff's right against self-incrimination. Although the Appellate opinion did not expressly consider these items, it is obvious that they are referred to in the paragraph at 345 F. 2d 499, 507 (7th Cir. 1965) which stated:

> Defendant raises various other issues, inter alia; whether the trial judge properly admitted certain evidence; . . . we have carefully considered these and all other issues raised by defendant and find no prejudicial error.

This constitutes a final ruling on those objections raised at trial and on appeal, and they are not considered here. The plaintiff however raises a new and serious question with respect to these items: whether their admission violated his privilege against compulsory self-incrimination as guaranteed by the Fifth Amendment to the Constitution.

These returns were filed as part of a comprehensive system for the taxation of wagering. Title 26 U.S.C. §4401 imposes an excise tax on wagers equal to ten per cent of the amount thereof. Title 26 U.S.C. §4403 provides that every person liable for the tax, meaning those engaged in the business of accepting wagers, shall keep a daily record showing the gross amount of wagers. To collect

these taxes, Treas. Reg. §44.6011(a)-1(a) requires the taxpayer to submit a Form 730 each month showing the wagers collected, etc. Although not required by the statute, the Internal Revenue Service will not accept the tax without the form. (See *United States* v. *Grosso*, 19 L. ed. 2d 906, 910-11 (1968)). Also part of this same system is the occupational tax on engaging in the business of accepting wagers. Title 26 U.S.C. §§4411-4414.

The effect of these statutes has been severely limited by the decisions of the Supreme Court in *Grosso* v. *United States*, 19 L. ed. 2d 906 (1968); and *Marchetti* v. *United States*, 19 L. ed. 2d, 889 (1968). In *Marchetti* the Court held that a plea of compulsory self-incrimination was a bar to prosecution for failure to comply with the wagering occupation tax, and *Grosso* held the same with respect to the wagering excise tax. *Grosso* also held that defendant's failure in that case to raise the Fifth Amendment question, with respect to a charge of failing to pay the occupation tax, did not waive his right against self-incrimination to that Count. There are three salient features of the opinions of importance in this case. A careful examination of the cases shows that the Court based its decisions on the widespread and almost total criminal prohibition against gambling of the type taxed. It found that a defendant subject to the tax was operating in the shadow of criminal penalties imposed by both State and Federal governments. This, coupled with the fact that Congress had provided for disclosure of all information garnered in connection with the occupation tax, and that the Internal Revenue Service revealed excise tax information to law enforcement officers as a matter of policy, led the Court to find that this scheme

seriously abridged the gamblers' right against self-incrimination. The Court held, in both cases, that a plea of self-incrimination would be a bar to prosecution. A defendant in a *criminal* prosecution for failure to pay the tax or abide by the ancillary requirements could not be convicted if he stated that to have abided by the requirements would have incriminated him.

Second, the Court did not strike down either tax. In *Marchetti,* it said, at 19 L. ed. 2d 889, 905:

> We emphasize that we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with their requirements.

Third, while the Court did not expressly deal with the admissibility of forms and returns filed in compliance with these acts either before or after its decisions, it did, over the vigorous objection of the Chief Justice, refuse to adopt a rule which would prohibit disclosure of information obtained under the acts rather than prohibit punishment for their violation. The Government had suggested prohibiting disclosure in an effort to save the criminal penalties associated with the tax and the Government's ability to collect the tax itself. The Court found that the Congressional purpose in requiring disclosure was so strong that it should not adopt the tendered alternative. In addition, this Court will have to consider the retroactive effect of the principles (although not the rule) adopted, and the possibility that the plaintiff here may have, at some point, waived any privilege with respect to these documents.

(Opinion of the United States District Court)

The first point is immediately in dispute. Mackey wa not charged with violating gambling laws. He was charge with income tax evasion. The fact that the Exhibits i question showed that he was guilty of other crimina activity, not directly relevant to this trial, has alread been considered by this Court and the Court of Appeals and will not be reconsidered. That there is no privileg against incriminating one-self by filing income tax re turns and keeping required records is too well established to require discussion. That was all these returns were used for in this case. They pointed to a possible source —whether legal or illegal is irrelevant—of income. They showed that the defendant Mackey could have earned more than he reported. It is certain that the Supreme Court would not have jeopardized the gambling tax scheme on the ground that required returns would have incriminated someone of having income or a source of income not reported on his income tax returns. Any possible compulsory self-incrimination involved in filing these returns was simply not relevant to the case at bar. Defendant was not charged with, and was not convicted of violation of the gambling laws.

Secondly, it is spurious to argue that the information gathered and introduced into evidence was a produce of unconstitutional statutes. As stated earlier, the Court did not find these statutes to be unconstitutional. Instead it held that it was unconstitutional to punish someone for failing to supply the information required by the statutes and attendant regulations. Exhibits 30 through 89 were therefore, not the fruits of an unconstitutional scheme.

Thirdly, the Court itself refused to find that these re turns, once filed, should be made confidential. Of course

in the future a person will not be able to claim that he was compelled to give evidence against himself after he files a return. He could have refused to file a return and the *Marchetti* and *Grosso* decisions would protect him from punishment. The issue here is whether a defendant who files returns prior to the decisions may claim that he was compelled to do so in violation of his constitutional rights.

There are two basic reasons for the prohibition against self-incrimination and the use of coerced confessions—their unreliability and the sanctity of the individual. They are unreliable because a person under severe physical and/or mental pressures may confess to a crime he did not commit solely to escape the torment imposed by his interrogators. This was the primary policy behind the rule which excluded only coerced confessions while admitting those which were voluntary, even if made without knowledge of one's rights. That rule, of course, has now been supplanted by one which looks not merely to the voluntariness of the confession, but also to the intelligent waiver of the right against self-incrimination. *Miranda* v. *Arizona*, 384 U.S. 436, 16 L. ed. 2d 694 (1966); *Escobedo* v. *Illinois*, 378 U.S. 478, 12 L. ed. 2d, 977 (1964). This newer approach looks not only to the trustworthiness of the confession, but also to the rights of the accused and the sanctity of the judicial process. It is based on the belief that the right against self-incrimination is not a mere rule of evidence, but a fundamental liberty afforded to the guilty and innocent alike. These dual considerations are important in determining the effect to be given decisions and rules in this area of the

law. (See *Johnson* v. *New Jersey*, 384 U.S. 719, 16 L. ed 2d, 882 (1966)).

In relation to the gambling excise tax returns, ther is little danger of their unreliability other than their pos sible understatement of liability. No one would file wagering tax return unless he was engaged in wagerin because he would incur a tax liability; his activities woul become subject to close scrutiny; and he might be prose cuted for a crime which he did not commit. On the othe hand, if he is not engaged in wagering, there is n reason for him to file a return. He is not subject to an "coercion" to confess to crime he has not committe There is no tax, and there is no penalty for not engagin in wagering or for not filing the return if one is no subject to the tax. It therefore cannot be said that th use of Forms 730 or other evidence of excise tax pay ment contributes to the unreliability of the fact findin process in a trial for income tax evasion, or even fo wagering.

There is also the other, now paramount, policy con sideration behind the privilege against self-incrimina tion—the liberty of citizens and the purity of the Courts This was obviously the motivating factor behind the de cisions in *Marchetti* and *Grosso* because—as has bee shown— the coerced confessions in this instance ar highly reliable. In *Marchetti* and *Grosso* the Suprem Court was given a singular opportunity to strike directl at the coercion rather than its fruits. In contrast to othe decisions, such as *Miranda* v. *Arizona*, 384 U.S. 436, 1 L. ed. 2d 694 (1966); and *Escobedo* v. *Illinois*, 378 U.S 478, 12 L. ed. 2d 977 (1964) where the Court sought t halt coercion by destroying its value to the interrogato

it had, in the wagering tax system, an opportunity to end and the coercion directly. Out of deference to the Congressional purpose, and over the objection of the Chief Justice, the Court found that it was better to bar the criminal penalties for refusing to supply the information rather than limit its use. *Marchetti* v. *United States,* 19 L. ed. 2d 889, 903-05 (1968); *Grosso* v. *United States,* 19 L. ed. 2d 906, 913 (1968). It would be inappropriate for this Court to adopt a rule expressly rejected by the Supreme Court.

This is especially true under these circumstances. While the Supreme Court did not lay down an exclusionary rule, this Court is asked to retroactively transform and apply the principles of *Marchetti* and *Grosso* to a case which had reached a final decision prior to their enunciation.

The Supreme Court itself has been reluctant to give retroactive application to the newer Fifth Amendment rules. In *Johnson* v. *New Jersey,* 384 U.S. 719, 16 L. ed. 2d 992 (1966) it denied retroactive application to the rules concerning right to counsel and warnings of self-incrimination at criminal interrogations. The Court said, at 384 U.S. 719, 728-29; 16 L. ed. 2d 882, 889:

> Finally, we emphasize the question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree. We gave retroactive effect to *Jackson* v. *Denno,* supra, (378 U.S. 368, 12 L. ed. 2d 908 (1964)) because confessions are likely to be highly persuasive with a jury and if coerced they may well be untrustworthy by their very nature. On the other hand, we denied retroactive application to *Griffin* v. *California,* supra,

(380 U.S. 609, 14 L. ed. 2d 106 (1965)) despite the fact that comment on the failure to testify may sometimes mislead the jury concerning the reasons why the defendant has refused to take the witness stand. We are thus concerned with a question of probabilities and must take account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth determining process at trial.

Jackson v. *Denno,* 378 U.S. 609, 12 L. ed. 2d 908 (1964) struck down the New York system of allowing juries to determine the voluntariness of confessions. The rule was made retroactive, despite a previous decision to the contrary, because of the great danger that jurors may have considered or been influenced by coerced and unreliable confessions even after they determined them to be involuntary. *Tehan* v. *Shott,* 382 U.S. 406, 15 L. ed. 2d 453 (1966) held that *Griffin* v. *California,* 380 U.S. 609, 14 L. ed. 2d 106 (1965) prohibiting comment on an accused's failure to testify should not be made retroactive because of the states' justified reliance upon previous decisions of the Court and the devastating effect upon thousands of final convictions.

The rule of *Gideon* v. *Wainwright,* 372 U.S. 335, 9 L. ed. 2d 779 (1963) requiring the states to supply counsel to indigent defendants in all felony prosecutions was given retroactive application because the absence of counsel tainted the entire criminal proceeding. On the other hand, the rule of *United States* v. *Wade,* 388 U.S. 218, 18 L. ed. 2d 1149 (1967) requiring the presence of counsel at pre-trial lineup and identification procedures, was denied retroactive effect in the decision of *Stovall* v.

Denno, 388 U.S. 293, 18 L. ed. 2d 1199 (1967), because of the drastic effects of retroactivity on numerous final convictions.

In each of the cases cited, the constitutional infirmity had at least some effect on the integrity and validity of the fact finding process. It became a question of weighing that effect against other considerations such as the reliance placed on previous decisions and the danger of clogging lower courts with numerous old and stale cases. In *Linkletter* v. *Walker,* 381 U.S. 618, 14 L. ed. 2d 601 (1965), the Court refused to apply *Mapp* v. *Ohio,* 367 U.S. 643, 6 L. ed. 2d 108 (1961) which prohibited the introduction of illegally seized evidence in state court proceedings to cases which had become final prior to its decision. It is the archtype of the use of an exclusionary rule to prohibit unconstitutional conduct on the part of law enforcement officers where that conduct did not intrinsically affect the validity of the trial. The fact that physical evidence was illegally seized has no effect on its probative value, but is excluded to prevent police from resorting to illegal seizures.

An examination of these and other cases reveals no instance where the Court has given retroactive application to an exclusionary rule or other Constitutional guarantee where the reliability of the fact finding process had not been jeopardized. The briefs for plaintiff have suggested none. In plaintiff Mackey's trial, the introduction of the wagering tax forms did not jeopardize the integrity of the trial except to the extent that they showed that he was engaged in illegal activities other than that charged. This possibility was raised by Mackey's attorneys at the trial, and apparently on appeal, and both times the Courts held that there was no error.

(Opinion of the United States District Court)

Finally, there is the possibility that plaintiff wai
his rights, if any, to have the items excluded on
ground that their admission violated his rights agai
compulsory self-incrimination. Neither plaintiff nor
attorneys raised the privilege against self-incriminat
at the time of trial. It is not claimed that plaintiff fi
the forms or paid the tax under protest. In short, at
time was the question of possible self-incrimination rai
with respect to these forms. On the other hand, it
admitted that plaintiff or his counsel did not know
the decisions in *Marchetti* and *Grosso* at the time
trial. The only law on the topic was found in the de
sions of *United States* v. *Kahriger,* 345 U.S. 22, 97 L.
754 (1953) and *Lewis* v. *United States,* 348 U.S. 419,
L. ed. 475 (1955) which held that the wagering occu
tion tax (Title 26 U.S.C. §4411 as opposed to Title
U.S.C. §4401, the excise tax involved here) was con
tutional and did not violate the privilege against s
incrimination. These decisions were overturned by
decision in *Marchetti* which held that a plea of self
crimination was at least a bar to prosecution. They
not without some effect, however, because in *Grosso*
Court reversed the defendant's conviction for violat
Section 441 even though he had never raised the con
tutional question. The Court stated, at 19 L. ed. 2d
913-14, that the defendant's reliance on the *Kahri*
and *Lewis* decisions precluded considering his silence
a voluntary waiver of his rights. See also *Harris*
United States, 390 F. 2d 617 (8th Cir. 1968). Plain
here argues that he, likewise, cannot be considered
have waived rights which he did not know existed.
situation is not the same, however, because *Kahri*
and *Lewis* did not consider the possibility of self

crimination involved in the excise tax, but only with respect to the occupation tax. One factor considered in both decisions with respect to the occupation tax was its prospective application. That is, the Court suggested that a person did not incriminate himself of having committed a crime by paying the occupation tax, because he was supposed to pay it before he gambled and not afterwards. See *United States* v. *Kahriger,* 345 U.S. 22, 32-33, 97 L. ed. 754, 763 (1953). The excise tax was different because there no tax was due until the wagers were taken and the crime committed. Paying the wagering tax is most places amounts to the admission of a crime, but no decision has been suggested where this was directly challenged. Therefore, if a defendant had wished to raise the constitutional question, he would not have been justified in relying on non-existent decisions, but should have raised it at the first instance, either by not paying the tax and raising the issue when prosecuted, or by paying the tax and objecting to the use of the information thus gained. The plaintiff here did neither. He paid the tax and did not, through his attorneys or otherwise, raise the constitutional question at trial. It is therefore held that he waived any right to have the information excluded on the basis of his privilege against self-incrimination.

In conclusion, it is held that the briefs, records and filed before the Court conclusively show that plaintiff is entitled to no relief on the ground that his right against self-incrimination was violated because, (1) the Supreme Court's reasons for holding that excise tax form were incriminating are unrelated to their possible use in a trial for income tax evasion; (2) the Supreme

(Opinion of the United States District Court)

Court itself refused to adopt a rule prohibiting their use at trial; (3) the information is not the product of an unconstitutional statute; (4) the principles plaintiff seeks to draw from the recent decisions should not be applied retroactively in this instance, because the admission of the exhibits in question did not impair the integrity of the fact finding process; and (5) the plaintiff waived any right to have the exhibits excluded on the grounds of self-incrimination by not raising it at trial. The plaintiff's petition for relief under Title 28 U.S.C. §2255 is denied.

/s/ George N. Beamer
U. S. District Judge

Enter: September 6, 1968

APPENDIX C

Judgment

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Wednesday, June 4, 1969

Before

Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. OTTO KERNER, *Circuit Judge*
Hon. JULIUS J. HOFFMAN, *District Judge*

FRED T. MACKEY,
Plaintiff-Appellant,
vs.
UNITED STATES OF AMERICA,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Indiana, Hammond Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 529

FRED T. MACKEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–9a) is reported at 411 F. 2d 504. The memorandum opinion of the district court (Pet. App. 10a–22a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1969. (Pet. App. 23a.) The petition for a writ of certiorari was filed on August 29, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner's 1964 conviction for income tax evasion should be set aside on collateral attack on the

365-503—69

basis of petitioner's contention that the admission in evidence of his wagering tax returns to show a likely source of income violated his privilege against self-incrimination.

STATEMENT

Petitioner was convicted by a jury in the United States District Court for the Northern District of Indiana of willfully attempting to evade income taxes by filing false and fraudulent joint individual income tax returns for the years 1956 through 1960. The conviction was affirmed on direct appeal, 345 F. 2d 499, certiorari denied, 382 U.S. 824. Following this Court's decisions in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, petitioner filed a motion under 28 U.S.C. 2255 to set aside his conviction[1] on the ground that the admission in evidence of 60 monthly wagering tax returns at his trial violated his privilege against self-incrimination. No objection on self-incrimination grounds was made either at the trial, or on direct appeal from conviction (Pet. App. 11a). The district court held that petitioner was not entitled to relief under 28 U.S.C. 2255 (Pet. App. B), and the court of appeals affirmed (Pet. App. A).

The government's evidence at trial showed that the net worth of petitioner and his wife increased from $361,461.52 to $1,519,744.05 during the five-year period involved, although their joint returns filed during the same period reported a total taxable income of only $143,339.24. The government's theory was that these

[1] Petitioner is presently on parole.

net worth increases, which included assets held in the names of nominees and companies controlled by petitioner, could not be accounted for by the combined receipts of the controlled companies and the income reported by petitioner, and that these assets were acquired by petitioner from unreported funds derived from his policy wheel (gambling) business. See *United States* v. *Mackey*, 345 F. 2d 499, 501. In order to show this likely source, the wagering excise tax returns were admitted in evidence. (R. 14–15, 19.)[2] Petitioner objected on the ground that the only purpose in introducing the returns was to create bias and prejudice in the minds of the jury because the same information was already in evidence—*i.e.*, since petitioner's income tax returns reported the amount of the (10%) federal excise tax paid on the gross receipts from petitioner's policy wheel business (as well as the net income), the gross receipts from the business could be calculated by multiplying the reported taxes by ten (R. 7–9, 13–14).[3] Petitioner's counsel conceded that the tax returns reported only a net figure (wagering receipts minus pay-outs), rather than the actual gross receipts from wagers. (R. 7–8.) The trial court concluded that, since the gross receipts did not appear in the income tax returns, the wagering tax returns themselves should be admitted. The court observed (R. 15): "I do not think the Government is required to ask the jury or anyone else to make a computation

[2] "R." refers to petitioner's appendix filed in the court of appeals.

[3] Petitioner's individual income tax returns contained a separate Schedule C which described petitioner's business as "policy operator".

from Schedule C, if that is the only evidence available."

ARGUMENT

1. Petitioner was represented by counsel at his trial for income tax evasion and was entirely free to object to the admission in evidence of his wagering tax returns on self-incrimination grounds. By failing to make any such objection, he must be deemed to have waived the point. He cannot excuse his failure by asserting that he relied on *United States* v. *Kahriger*, 345 U.S. 22, or *Lewis* v. *United States*, 348 U.S. 419. Those cases held only that one who failed to register and pay the $50 occupational tax may be convicted for such failure; they did not decide the question whether forms or returns filed under the wagering tax laws could be used in evidence. It does not follow that even though petitioner may have felt obliged to file the returns under then-existing law, he also had reason to believe that it would be fruitless to object to the use to which they were put at his trial. The point was not decided in *Kahriger* and *Lewis*, and it remained open to petitioner if he thought it had merit.

2. Petitioner's belated self-incrimination contention rests exclusively on the principles announced by this Court in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62. His reliance on those cases is misplaced, however.

Even if petitioner had raised a self-incrimination objection to the admission of the wagering tax returns, it is doubtful whether such an objection would be sustained under the rationale of *Marchetti* and *Grosso*. The privilege was sustained as a defense in

those cases because a person required to file such returns is confronted by the substantial hazard that they may be used to convict him for having violated the laws against gambling. Here, petitioner was not prosecuted for any violation of gambling laws, but for filing false income tax returns on which he failed to report all of his taxable income; the returns were used to show a likely taxable source for proven increases in petitioner's net worth. Any kind of tax return, although it was filed under the compulsion of a statute, is ordinarily admissible when it is similarly relevant in a criminal case.[4] To the extent that petitioner was incriminated, it arose solely from the fact that he had reported the receipt of income, and was entirely unrelated to the source of that income. Thus, there is no ground for petitioner's assertion (Pet. 9) that "This is a coerced confession case." The returns showing gross receipts from gambling hardly constituted an admission of any income tax offense until petitioner himself later undertook to omit a substantial part of his income from his tax returns. The wagering returns would have been just as relevant if gambling had been a lawful activity.

Moreover, to the extent that *Marchetti* and *Grosso* are necessary to sustain petitioner's contention, those

[4] Thus, in prosecutions for income tax evasion, a taxpayer's income tax returns for prior years are frequently introduced in evidence in order to contradict the defense that net worth increases are attributable to large prior accumulations of cash, or to show a long-standing pattern of understating income, in proof of willfulness. See, *e.g.*, *Holland* v. *United States*, 348 U.S. 121; *Smith* v. *United States*, 348 U.S. 147; *United States* v. *Alker*, 260 F. 2d 135, 148 (C.A. 3), certiorari denied, 359 U.S. 906.

decisions should not be applied retroactively to this case, for the reasons fully stated by the court of appeals (Pet. App. 4a–9a). "The unreliability of the fact-finding process which is the touchstone of retroactivity is simply not threatened by the impersonal command of the wagering tax laws" (Pet. App. 7a). In such circumstances, this Court has denied retroactive application of an overruling constitutional decision. See *Tehan* v. *Shott*, 382 U.S. 406, 415–416; *Linkletter* v. *Walker*, 381 U.S. 618, 639.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
JOSEPH M. HOWARD,
JOHN M. BRANT,
Attorneys.

OCTOBER 1969.

U. S. GOVERNMENT PRINTING OFFICE: 1969

FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 15 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~525~~ 36

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

WILLIAM M. WARD
39 S. LaSalle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner,
Fred T. Mackey

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3986

In The

Supreme Court of the United States

October Term, 1969

No. 529

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

The Brief in Opposition filed by the Government fails to meet the vital issue put before this Court by Petitioner, i.e., may a conviction be allowed to stand which is founded in part upon a coerced admission of a link in the chain of evidence needed to convict?

In seeking the courts' assistance in these post-conviction proceedings, Petitioner was mindful of this Court's statement, which, although made in connection with more revolting circumstances, should nonetheless always be applicable in cases where a conviction is founded in whole or in part upon statements wrung from the defendant under fear of punishment:

> "Coercing the supposed state's criminals into confessions and using such confessions so coerced from them against them in trials has been the curse of all countries. It was the chief inequity, the crowning infamy of the Star Chamber, and the Inquisition, and other similar institutions. The constitution recognized the evils that lay behind these practices and prohibited them in this country. . . . The duty of maintaining constitutional rights of a person on trial for his life rises above mere rules of procedure and wherever the court is clearly satisfied that such violations exist, it will refuse to sanction such violations and will apply the corrective."[1]

The Government urges a denial of this petition upon three grounds:

1. Waiver. This highly technical assault upon a constitutional claim totally ignores that all authorities, including the Solicitor General of the United States, believed that Petitioner had no privilege which he could assert or waive at the time of trial (Petition, pp. 13-14). It also ignores this Court's decision in *Leary* v. *United States,* 395 U.S. 6, 27-28 which held there could be no waiver of the privilege in similar circumstances. It also ignores that the record in this case is clear that a failure to raise the constitutional claim at trial was not a

---

[1] *Brown* v. *Mississippi*, 297 U.S. 278, 287.

deliberate design or strategic trial choice (Petition, p. 14). This procedural defense should be no more dispositive of the case at bar than it was in *Leary*.

2. That in any event, the wagering tax returns were admissible even if the privilege had been raised and denied. This argument rests mainly upon *United States* v. *Sullivan*, 274 U.S. 259, which held that the filing of *income tax returns* was not protected by the privilege even though they may contain incriminating statements. But as Mr. Justice Brennan concurring in *Grosso* stated: (390 U.S. 72, 73):

> "*United States* v. *Sullivan, supra*, makes clear that an individual is not exempted, by the fact that he may be privileged to refuse to answer some questions, from a requirement, 'directed at the public at large,' of filing an income tax return exclusively containing questions 'neutral on their face.' *Albertson* v. *SACB*, 382 U.S. 70, 79. *Shapiro* v. *United States*, *supra*, involved a similar situation: it involved a record-keeping requirement pursuant to a neutral governmental system of price regulation.
>
> "On the other hand, we know that where the government scheme clearly evidences the purpose of gathering information from citizens in order to secure their conviction of crime, it contravenes the privilege."

This is precisely what the case at bar is all about. Both opinions in *Grosso* and *Marchetti* are instinct with the understanding that the wagering tax statutes had little to do with the revenues of the United States. These statutes were not "directed at the public at large" to secure information neutral on its face, but were directed at gamblers for the purpose of obtaining information and evidence to be used in investigating and

prosecuting gamblers. They were used for exactly those purposes in this case. This is admitted by the Government (Brief, pp. 2-3). Former Commissioner Caplin further admitted this practice when he stated that the I.R.S. used information obtained under the wagering tax statutes to prosecute gamblers for evasion of wagering taxes *and income taxes* (8 Crime & Delin., 378, noted in *Marchetti*, 390 U.S. at p. 48). To say, as the Government does (Brief, p. 5), that the wagering tax returns would have been relevant if gambling had been a lawful activity begs both the question and reality. For if gambling were lawful, there would be no wagering tax statutes, no *Marchetti* and *Grosso*, and no *Mackey* v. *United States* before this Court on this Petition.

3. Retroactivity. We again point out to this Court its recent statement in *Jenkins* v. *Delaware*, 395 U.S. 213, 221 where it is stated that a defendant may resort to available federal procedures to insure that statements admitted against him were made voluntarily. This Court has already ruled in *Marchetti* and *Grosso* that the wagering tax returns submitted by Petitioner were not voluntarily made and submitted. This self-incrimination claim is a fundamental and substantive constitutional claim at issue in this cause. This Court has always held such a claim to be subject to retroactive application (Petition, pp. 12-13).

CONCLUSION.

This Court has presently before it on petition by the Government two cases involving the scope of *Marchetti* and *Grosso; United States* v. *Knox,* No. 17, and *U.S. Coin & Currency,* No. 8. We believe that the instant Petitioner presents far more important issues concerning the use to which the Government can put statements coerced from a person through fear of legal punishment under a statute whose major if not sole purpose was to secure such statements. Petitioner does not know the number of persons convicted in Federal and State courts on evidence procured under the compulsion of the wagering tax statutes. We would think there are quite a few. A decision by this Court in the case at bar would define whether or not they were convicted in derogation of their right not to be a witness against themselves in a criminal proceeding, and would clear up this point left open by *Marchetti* and *Grosso.* We urge this Court to grant this Petition and hear this case in conjunction with those cases already before it.

Respectfully submitted,

WILLIAM M. WARD,
39 South La Salle Street,
Chicago, Illinois 60603,
ANdover 3-2180,

Attorney for Petitioner
Fred T. Mackey.

FILE COPY

FILED
NOV 19 1969
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~530~~ 36

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

~~Brief~~

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

WILLIAM M. WARD
39 S. LaSalle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner,
Fred T. Mackey

MIDWEST LAW PRINTING CO., CHICAGO 60611, FINANCIAL 6-2000

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 529

FRED T. MACKEY,

Petitioner,

VS.

UNITED STATES OF AMERICA

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner Fred T. Mackey files this Supplemental Petition for a Writ of Certiorari to advise this Court of the recent decision of the United States Court of Appeals For The Fifth Circuit in *United States* v. *Lucia*, No. 26316 and 26317. This case creates a conflict between the courts of appeal concerning the retroactivity of

Marchetti and *Grosso*. This case is unreported, and is set out in full in the Appendix hereto. We believe that the decision and reasoning of the Court in *Lucia* is of strong persuasion on the issues raised in the proceedings at bar.

In 1965, Lucia pleaded guilty and was sentenced and fined on an indictment charging him *inter alia* with failure to file the Form 730, Tax on Wagering Returns. Subsequently, and while Lucia was on probation, this Court decided *Marchetti* and *Grosso*. Lucia then filed a petition in the nature of a writ of error coram nobis to vacate and set aside his judgment and sentence. The District Court denied this motion and the Court of Appeals reversed and remanded on the grounds that *Marchetti* and *Grosso* required such retroactive relief.

The decision of the Court of Appeals in *Lucia*, insofar as it bears on the case at bar is as follows:

1. There was no waiver of the self-incrimination defense when Lucia pleaded guilty. The Government in the case at bar contends that Mackey waived his privilege by not claiming it at trial. Petitioner has argued that he had no privilege at trial which he could waive because of the then existing rule as laid down in *U. S.* v. *Kahriger*, 345 U.S. 22, and *Lewis* v. *United States*, 348 U.S. 419. The Court in *Lucia* agrees, pointing out that "By logical extension, these decisions rule out all the more strongly the waiver of a right, such as Lucia's, that is unknown not because of any infirmity on the defendant's part, but because it is unknowable" (App., pp. 4a-5a).

2. This Court's decisions in *Marchetti* and *Grosso* are to be retroactively applied. In *Lucia*, the Court was faced with the reverse side of the coin presented in the petition at bar. That is, Lucia was not coerced into

supplying the Government with admissions of gambling which were used against him in a related criminal proceeding. Lucia did not file the 730 Forms, and was criminally indicted and convicted for this failure pursuant to the wagering tax statutes. In other words, he refused to talk and was punished for this refusal.

In the case at bar, Petitioner did file the returns to escape Lucia's punishment. But Petitioner's coerced admissions of gambling were then admitted against him to provide a link in the chain of evidence needed to convict of income tax evasion arising out of alleged unreported income from that gambling.

In holding *Marchetti* and *Grosso* retroactive, the Court of Appeals emphasized the purpose of those decisions to renew the absolute sanctity of the privilege against self-incrimination (App. pp. 11a-12a):

> "We feel, however, that we should give greater weight to the purpose of *Marchetti* and *Grosso* than to the factor of reliance. The purpose of the *Marchetti-Grosso* rule is to protect the constitutional privilege against a statutory system jeopardizing it. The purpose is not to deter unlawful police action. Nor is it to sharpen the fact-finding process . . . It does not involve guilt or innocence. Indeed, the 'constitutional privilege was intended to shield the guilty and the imprudent as well as the innocent and foresighted . . .' *Marchetti,* 390 U.S. at 51. The Supreme Court concluded that the objective of the statute—to force disclosure by punishing silence—was improper. Since the aim of the statute is constitutionally impermissible, courts should not continue to enforce its sanctions."

Petitioner urges that if it is constitutionally improper "to force disclosure by punishing silence", *a fortiorari*,

it must be at least equally improper for the Government to punish by and through the use of the disclosures obtained by it through the fear of punishment for silence. To put it simply, a conviction founded in part upon a coerced admission must never be allowed to stand.

CONCLUSION.

As noted in Petitioner's reply, this Court has granted certiorari in two cases involving the scope of *Marchetti* and *Grosso; United States* v. *Knox,* No. 17, and *United States* v. *U. S. Coin & Currency,* No. 8. We think it safe to surmise that *Lucia* will be before this Court on Petition brought by the Government. We again respectfully urge this Court to grant this Petition and hear this case in conjunction with those cases before it, and to be before it.

Respectfully submitted,

WILLIAM M. WARD
39 S. LaSalle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner,
Fred T. Mackey

APPENDIX

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 26316

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSEPH P. LUCIA,
Defendant-Appellant.

No. 26317

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOSEPH P. LUCIA,
Defendant-Appellant.

Appeals from the United States District Court for the Southern District of Texas

(September 17, 1969)

(Appendix)

Before WISDOM and GODBOLD, Circuit Judges, and HUGHES, District Judge.

WISDOM, Circuit Judge: This appeal turns upon whether the Supreme Court's decisions in *Marchetti* v. *United States,* 1968, 390 U.S. 39, 88 S. Ct. 687, 19 L. Ed. 2d 889, and *Grosso* v. *United States,* 1968, 390 U.S. 62, 88 S. Ct. 709, 19 L. Ed. 2d 906, should be applied retroactively. We hold that they should be applied retroactively and reverse the judgment of the district court.

Joseph P. Lucia was indicted in the Southern District of Texas September 18, 1964, on various counts for violation of provisions of the federal statutory scheme for taxing illegal wagers. Lucia first pleaded not guilty to all counts of the indictment, but at his rearraignment January 18, 1965, he changed his plea to guilty to Count 12 of the indictment. That count charged him with attempting to evade the excise tax on wagering (1) by failing to file the required Form 730 (Tax on Wagering Returns), (2) by failing to keep certain records as required by 26 U.S.C. §4403 and (3) by various acts of concealment, all in violation of 26 U.S.C. § 7201. The court dismissed the remaining counts.

That same day the United States attorney filed a criminal information charging Lucia and others with conspiring willfully to fail to pay the federal excise tax on gambling, imposed by 26 U.S.C. §4401, in violation of 18 U.S.C. §371. The defendant again pleaded

guilty. The court sentenced him to consecutive terms of six months on the conspiracy charge and five years on the evasion charge. It also imposed a $10,000 fine on each count. The court suspended the five-year sentence and put Lucia on probation. He has paid the fine and served the remaining six-month sentence.

In January 1968 the Supreme Court decided *Marchetti* and *Grosso,* cases holding that a defendant's assertion of the privilege against self-incrimination under the Fifth Amendment is a bar to prosecution for violation of the federal laws taxing illegal wagers. Relying on these cases, Lucia filed a motion, in the nature of a writ of error coram nobis, to vacate and set aside judgments and sentences below. Lucia pointed out that although he had completed his sentence, he still remained on probation and was continuing to suffer certain civil disabilities as a result of his conviction. The district court held that *Marchetti* and *Grosso* had not voided the statutes under which Lucia had been convicted, but had merely provided a defense to them; a defense, the court said, that could not be applied retroactively. The court also held that Lucia's guilty plea waived all defenses, including any defense based upon his privilege against self-incrimination. This appeal followed the district court's denial of Lucia's motion.

I.

We disagree with the district court's holding that Lucia waived his self-incrimination defense when he pleaded guilty. The accepted definition of waiver, adopted by the Supreme Court in *Johnson* v. *Zerbst,* 1938, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461,

1466, is "an intentional relinquishment or abandonment of a known right or privilege". The courts will not accept an accused's loss of a constitutional right when he does not understand what he is losing. *Miranda* v. *Arizona*, 1966, 384 U.S. 436, 88 S. Ct. 1602, 16 L. Ed. 2d 1602; *Boykin* v. *Alabama*, 1969, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274; also see Fed. R. Crim. p. 11. In *Boykin* the Court noted that among the "federal constitutional rights . . . involved in a waiver that takes place when a plea of guilty is entered . . . is the privilege against compulsory self-incrimination." The Court pointed out that the "requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation". As long ago as the decision in *Carnley* v. *Cochran*, 1962, 369 U.S. 506, 82 S. Ct. 884, 8 L. Ed. 2d 70, the Supreme Court had held: "Presuming waiver from a silent record is impermissible."

Lucia had no knowledge of his right against self-incrimination under the *Grosso* and *Marchetti* rule for, at the time, those cases had not been decided. In earlier cases, *United States* v. *Kahriger*, 1953, 345 U.S. 22, 73 S. Ct. 510, 98 L. Ed. 754, and *Lewis* v. *United States*, 1955, 348 U.S. 419, 75 S. Ct. 415, 99 L. Ed. 475, the Supreme Court had rejected the contention that the prosecution under the federal gambling tax scheme violates the Fifth Amendment. Lucia, therefore, could not have "knowingly and intentionally" waived his privilege against prosecution: that privilege did not exist *Johnson* v. *Zerbst* and *Miranda* v. *Arizona* invalidate the waiver of rights that the defendant's own inexperience or ignorance prevent him from knowing. By logical extension, these decisions rule out all the more strongly

the waiver of a right, such as Lucia's, that is unknown not because of any infirmity on the defendant's part, but because it is unknowable.

This is a dictate of common sense. Precedent supports it. The Supreme Court has repeatedly held that a party cannot be said to waive a right that was judicially created *after* the supposed waiver. *Curtis Publishing Co.* v. *Butts,* 1967, 388 U.S. 130, 87 S. Ct. 1975, 18 L. Ed. 2d 1094, a *civil* suit for libel, was tried before the Supreme Court's decision in *New York Times Co.* v. *Sullivan,* 1964, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, which recognized for the first time certain First Amendment defenses against libel claims. On appeal, the defendant raised a *New York Times* defense, but the court concluded that the right had been waived. The Supreme Court reversed:

> "As our dispositions of *Rosenblatt* v. *Baer,* 383 U.S. 75, 86 S. Ct. 669, 15 L. Ed. 2d 597, and other cases involving constitutional questions indicate, the mere failure to interpose such a defense *prior to the announcement of a decision which might support it cannot prevent a litigant from later invoking such a ground.* Of course it is equally clear that even constitutional objections may be waived by a failure to raise them at the proper time, [citing case] but an effective waiver must, as was said in *Johnson* v. *Zerbst,* be one of a 'known right or privilege'." 388 U.S. at 143, 87 S. Ct. at 1985, 18 L. Ed. 2d at 1104. (Emphasis added.)

If Curtis, a defendant in a *civil* case, did not waive an unannounced constitutional defense by his failure

to raise it at trial, Lucia, an accused in a *criminal* case, did not waive his constitutional defense.

Grosso compels the same conclusion. The defendant there was charged with failure to pay both the occupational tax on gambling and the excise tax on gambling proceeds. At trial *Grosso* raised constitutional objections to the occupational-tax counts, but not to the excise-tax counts. The Supreme Court reversed, nonetheless, on *all* counts:

> "Given the decisions of this Court in *Kahriger* and *Lewis,* supra, which were on the books at the time of petitioner's trial, and left untouched by *Albertson* v. *SACB,* 382 U.S. 70, 86 S. Ct. 194, 15 L. Ed. 2d 165, we are unable to view his failure to present this issue as an effective waiver of the constitutional privilege." 390 U.S. at 71, 88 S. Ct. at 715, 19 L. Ed. 2d at 913-914.

The United States contends that even if the waiver must be knowing, and if waiver of specific defenses at trial assumes knowledge of their existence, there is something special about a guilty plea that makes the possible defenses irretrievable: "a plea of guilty waives all defenses and procedural defects which are not jurisdictional". That statement is true only when the defendant is able to assess the various defenses available to him, as well as the consequences of submitting to conviction. Otherwise, the requirements integral to accepting guilty pleas makes no sense. See Fed. R. Crim. P. 11; *McCarthy* v. *United States,* 1969,

394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418; *Von Moltke* v. *Gilles*, 1947, 332 U.S. 708, 68 S. Ct. 316, 92 L. Ed. 309. A plea of guilty is an abbreviated way of going down the list of possible defenses and privileges—right to counsel, jury trial, confrontation of witnesses, self-incrimination, etc.—and waiving each one.[1] The plea represents the relinquishment of a bundle of defenses, and has no magical implications with regard to finality beyond that. The whole does not exceed the sum of its parts. If one of the component waivers was ineffective because of the inadequate knowledge upon which it was made, the defect is not cured by virtue of the fact that the waiver was made implicitly, as part of a guilty plea.

In *Haynes* v. *United States*, 1968, 390 U.S. 85, 88 S. Ct. 722, 19 L. Ed. 2d 923, the Supreme Court upheld the privilege against self-incrimination as a valid defense to prosecution under the National Friearms Act, under a rationale similar to that in *Marchetti*. Haynes had pleaded guilty. The Supreme Court in a footnote pointed out the absence of waiver: "Petitioner's plea of guilty did not, of course, waive his previous claim of constitutional privilege." 390 U.S. at 87, 88 S. Ct. at 725, 19 L. Ed. 2d at 926.

---

[1]See *United States ex rel. Rogers* v. *Warden of Attica State Prison*, 2 Cir. 1967, 381 F. 2d 209, 213:

> "[W]e must be wary of blindly applying . . . [the guilty plea waiver] doctrine to every case involving such a plea. There is nothing inherent in the nature of plea of guilty which ipso facto renders it a waiver of a defendant's constitutional claims. Rather, waiver is presumed because ordinarily such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claims by available state procedures . . ."

(Appendix)

Several post-*Marchetti* and *Grosso* decisions have rejected arguments that failure to assert the constitutional defense guaranteed by the Fifth Amendment, constituted a waiver of the defendant's constitutional rights. In *United States* v. *Manfredonia*, 2 Cir. 1968, 391 F. 2d 229, the court said:

> "Since in *Marchetti* the privilege had been asserted at the trial, the government argues here that the appellants' failure to assert the privilege against self-incrimination as a defense at trial amounted to a waiver of protection . . . At the time of the trial of these appellants the wagering statutes were valid and the decisions in *Lewis* v. *United States*, 1955, 348 U.S. 419, 75 S. Ct. 415, 99 L. Ed. 475 and *United States* v. *Kahriger*, 1952, 345 U.S. 22, 73 S. Ct. 510, 97 L. Ed. 754 were still applicable. There is no reason to suspect that appellants knowingly waived their Fifth Amendment privilege at trial. These defendants should not be required to anticipate the Supreme Court action overruling *Lewis* and *Kahriger* or compelled to make the futile gesture of raising the privilege at trial to preserve their rights in the event of an overriding decision. We believe the effect of the Supreme Court decisions in *Marchetti* and *Grosso* is to prevent enforcement of the wagering statutes as they are now designed because of the 'substantiality of the risks of incrimination.'" 391 F. 2d at 230.

Accord: *Harris* v. *United States*, 8 Cir. 1968, 390 F. 2d 616; *United States* v. *Lookretis*, 7 Cir. 1968, 398 F. 2d 64. See also *United States* v. *Butler*, 5 Cir. Nos. 22,274 and 23,055, aff'd 361 F. 2d 266; vacated and remanded for

further consideration in light of *Marchetti* and *Grosso; DeCesare* v. *United States,* 1968, 390 U.S. 200, 88 S. Ct. 900, 19 L. Ed. 2d 1026. Although these cases were all direct appeals from judgments which had not become final, the rationale on which they rest is applicable to the case before the Court.

We conclude that Lucia's failure to raise the self-incrimination defense in the trial court and his plea of guilty did not prevent his raising the point in the present action. See *United States* v. *Miller,* 4 Cir. 1969, 406 F. 2d 1100.

II.

The test for deciding the retroactivity of new constitutional standards of criminal procedure has been progressively developed in a recent line of Supreme Court decisions.[2] *Linkletter* v. *Walker,* 1965, 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601; *Tehan* v. *Shott,* 1966, 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453; *Johnson* v. *New Jersey,* 1966, 384 U.S. 719, 86 S. Ct. 1772, 16 L. Ed. 2d 882; *Stovall* v. *Denno,* 1967, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199; *Desist* v. *United States,* 1968, 394 U.S.

---

[2]Commentators have been active in this area. See Bender, The Retroactive Effect of an Overruling Constitutional Decision: *Mapp* v. *Ohio,* 110 U. Pa. L. Rev. 650 (1962); Currier, Time and Change in Judge-Made Law: Prospective Overruling, 51 U. Va. L. Rev. 201 (1965); Meador, Habeas Corpus and the "Retroactivity" Illusion, 50 U. Va. L. Rev. 1115 (1964); Mishkin, The Supreme Court, 1964 Term Foreword: The High Court, the Great Writ and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965); Schaeffer, The Control of "Sunbursts": Techniques of Prospective Overruling, 42 N.Y.U.L. Rev. 631 (1967); Schwartz, Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin, 33 U. Chi. L. Rev. 719 (1966).

244, 89 S. Ct. 1030, 22 L. Ed. 2d 248. *Stovall* sets out the formula to be applied in each case:

> "The criteria guiding resolution of the questions implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." 388 U.S. at 297, 87 S. Ct. at 1970, 19 L. Ed. 2d at 1203.

"Foremost among these factors is the purpose to be served by the new court rule." *Desist* v. *United States,* 394 U.S. at 249. As the Court pointed out in *Desist* "it was principally the Court's assessment of the purpose of *Mapp* v. *Ohio,* 1961, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081, which led it in *Linkletter* to deny those finally convicted the benefit of *Mapp's* extension of the exclusionary rule to the states." 394 U.S. at 249. The exclusionary rule is "based on the necessity for an effective deterrent to illegal police action". When the court has made its rulings prospective only, it has done so on the rationale that the damage caused by the improper governmental behavior will not be undone or repaired by reversing existing convictions. Thus in *Linkletter,* the defendant's privacy had already been breached by an illegal search. In *Mapp* v. *Ohio,* the fruits of such searches were held inadmissible at trial. The deterrent purpose of the *Mapp* rule would not "be advanced by making the rule retrospective. The misconduct of the police has already occurred and will not be corrected by releasing the prisoners involved". *Linkletter,* 381 U.S. at 637.

In contrast, new constitutional rules going to the undamental fairness of a trial, the accuracy and reability of the fact-finding process, rules that substanially reduce the likelihood that an innocent person vill be convicted, have received retroactive applicaion. For example, in *Bruton* v. *United States*, 1968, 91 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476, overturning *Delli Paoli* v. *United States*, 1957, 352 U.S. 232, 77 S. Ct. 294, 1 L. Ed. 2d 278, the court held that the admission of a defendant's extra-judicial confession implicating a co-defendant violates the co-defendant's right to confront his accuser under the Sixth Amendment. In *Roberts* v. *Russell*, 1968, 392 U.S. 293, 295, 88 S. Ct. 1921, 1922, 20 L. Ed. 2d 1100, 1103, the Court held that "[this] constitutional error presents a serious risk that the issue of guilt or innocence may not have been reliably determined." The purpose of the new *Bruton* rule, greater accuracy in guilt-determination, applied to past as well as future trials, and the Court therefore extended *Bruton* retroactively.

There is no doubt that at the time of Lucia's arrest, indictment, and trial, the prosecution relied on the state of the law as represented by *United States* v. *Kahriger* and *Lewis* v. *United States*. The *Stovall* factor of reliance therefore weighs against retroactive application of the *Marchetti-Gross* rule. We feel, however, that we should give greater weight to the purpose of *Marchetti* and *Grosso*[3] than to the factor of reliance. The purpose of the *Marchetti-Grosso* rule is to protect

[3] See *Desist* v. *United States*, 1969, 394 U.S. 244, 249 n. 14, 89 S. Ct. 1030, 22 L. Ed. 2d 248.

the constitutional privilege against a statutory system jeopardizing it. The purpose is not to deter unlawful police action. Nor is it to sharpen the fact-finding process. It does not involve guilt or innocence. Indeed, "the constitutional privilege was intended to shield the guilty and the imprudent as well as the innocent and foresighted . . ." *Marchetti* 390 U.S. at 51. The Supreme Court concluded that the objective of the statute—to force disclosure by punishing silence—was improper. Since the aim of the statute is constitutionally impermissible, courts should not continue to enforce its sanctions. Stated in terms of balancing *Stovall* factors, we consider the preservation of the Fifth Amendment privilege against self-incrimination more important than the fact that the government relied on earlier—now overruled—decisions. We disagree, therefore, with the conclusions the Sixth Circuit reached in *Graham* v. *United States*, 6 Cir. 1969, 407 F. 2d 1313.

The third *Stovall* factor is the extent of the burden on the administration of justice that would result from retroactivity. The number of offenders presently in jail under the federal gambling tax laws must be small indeed. The government acknowledged in its brief that no one had been prosecuted under the wagering laws since the Supreme Court decided *Marchetti* and *Grosso*. According to the brief, 17 persons of the 1262 convicted under these laws in 1965 and 1966 received prison

terms longer than one year. We do not have to fear a wholesale emptying of the jails. Nor will the courts and United States Attorneys be taxed with retrying old offenses on the basis of stale evidence. In short, the practical effects of retroactivity in this case will be minimal.

Marchetti and *Grosso* rested upon the constitutional principle that a man's dignity is violated when he is forced into the dilemma of either speaking against himself or suffering criminal sanctions. Lucia's dignity has already been violated, since the government has long since indicted, tried, and punished him. In that sense the harm to him cannot be repaired, and he stands in *Linkletter's* position. Unlike *Linkletter,* however, he stands convicted of no act that the government now can legitimately punish.

The judgment of the district court is REVERSED and the cause is REMANDED for disposition consistent with this opinion.

FILE COPY

FILED
JAN 22 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~529~~ 36

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER FRED T. MACKEY

WILLIAM M. WARD
39 S. LaSalle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner, Fred T. Mackey

PETITION FOR CERTIORARI FILED AUGUST 29, 1969
CERTIORARI GRANTED DECEMBER 8, 1969

INDEX

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provision and Statutes Involved 3

Statement 6

Summary of Argument 10

Argument 12

I.

Because Petitioner's Conviction Was Obtained Through The Use Of Involuntary And Coerced Admissions Of A Link In The Chain Of Evidence Needed To Prosecute And Convict, It Must Be Vacated And Set Aside And A New Trial Ordered 12

II.

The Decisions Of Marchetti And Grosso That The Coerced Filing Of The Wagering Tax Returns Violated Petitioner's Privilege Against Self-Incrimination Must Be Retroactively Applied 26

III.

Petitioner Did Not Waive A Known Privilege At Trial 30

Conclusion 33

List Of Authorities Cited

Cases:

Albertson v. Subservice Activities Control Board, 382 U.S. 70 ..... 17, 18
Blau v. United States, 340 U.S. 159 ..... 18, 19
Boyd v. United States, 116 U.S. 616 28
Bram v. United States, 168 U.S. 532 21
Brown v. Mississippi, 297 U.S. 278 26
Clewis v. Texas, 386 U.S. 707 24
Counselman v. Hitchcock, 142 U.S. 547 ..... 17, 18
Davis v. North Carolina, 384 U.S. 737 27
Desist v. United States, 394 U.S. 244 27
Garrity v. New Jersey, 385 U.S. 493 ..... 23, 24
Greenwald v. Wisconsin, 390 U.S. 519 24
Griffin v. California, 380 U.S. 609 (1965) 22, 24
Grosso v. United States, 390 U.S. 62 ..... 15, 16, 32
Harrison v. United States, 392 U.S. 219 18
Haynes v. Washington, 373 U.S. 503 ..... 24, 25
Hoffman v. United States, 341 U.S. 479 18
Holland v. United States, 348 U.S. 121 6
Jackson v. Denno, 378 U.S. 368 ..... 13, 28
Jenkins v. Delaware, 395 U.S. 213 27
Johnson v. Zerbst, 304 U.S. 458 30
Leary v. United States, 395 U.S. 6 31

Lewis v. United States, 348 U.S. 419 11

Linkletter v. Walker, 381 U.S. 618 27

Lisenba v. California, 314 U.S. 219 13

Malloy v. Hogan, 378 U.S. 5 (1964) 17, 21

Marchetti v. United States, 390 U.S. 39 ..... 15, 16

Mills v. Louisiana, 360 U.S. 230 21

Miranda v. Arizona, 384 U.S. 436 ..... 14, 15, 31

Murphy v. Waterfront Commissioners, 378 U.S. 52 18

Rogers v. California, 365 U.S. 534 13

Slochower v. Board of Education, 350 U.S. 551 23

Spano v. New York, 360 U.S. 315 ..... 13, 24, 25

Spevack v. Klein, 385 U.S. 511 23

Sullivan v. United States, 274 U.S. 259 ..... 13, 16

Tehan v. Shott, 382 U.S. 406 27

United States v. Coffey, 2 Cir., 198 F. 2d 438 (1952) 18

United States v. Costello, 2 Cir., 352 F. 2d 848 (1965) 24

United States v. Kahriger, 345 U.S. 22 11

United States v. Knox, No. 17, December 8, 1969, 38 L.W. 4016 ..... 19, 26

United States v. Lookretis, 7 Cir., 398 F. 2d 64 (1968) 19

United States v. Lucia, 5 Cir., 416 F. 2d 920 (1969) 29, 31

United States v. Meyers, 276 F. Supp. 748 (E.D., Pa., 1967) 32

United States v. Riccio, (N.D., Ill. 1968) 282 F. Supp. 979 15

United States v. Weisman, 2 Cir., 111 F. 2d 260 (1940) 18

Wood v. United States, D.C., Cir., 128 F. 2d 265 (1942) 30

Constitutional Provision and Statutes:

Fifth Amendment, United States Constitution 3, 12

8 Wigmore, Evidence 345 (McNaughten Rev. 1961) 20

26 U.S.C. Sects, 7201, 7202, 7203 ..... 3, 5, 6

28 U.S.C. Sect. 2255 ..... 3, 4

Treatises:

Caplin, The Gambling Business & Federal Taxes, 8 Crime & Delinquency, 371, 372, 377 16

Griswold, The Fifth Amendment Today, (Harvard Univ. Press, 1955) (p. 9) 14, 18, 19

Levy, Origins of the Fifth Amendment, (Oxford Univ. Press, 1968) (p. 432) 28, 29, 30

II Schwartz, Rights of The Person, 830 (MacMillan, 1968) 17

In The

Supreme Court of the United States

October Term, 1969

No. 529

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER FRED T. MACKEY

OPINION BELOW.

The opinion of the Court of Appeals (A. 47-55) is reported at 411 F. 2d 504. The memorandum opinion of the District Court is unreported (A. 27-38).

JURISDICTION.

The judgment of the Court of Appeals was entered on June 4, 1969 (A. 46). The petition for a writ of certiorari was granted on December 8, 1969. Jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1254 (1).

QUESTIONS PRESENTED.

1. Whether this Court's decisions in *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, which held that the filing of wagering excise tax returns violates a taxpayer's privilege against self-incrimination must be applied retroactively in a 28 U.S.C. Sect. 2255 proceeding to set aside a conviction for income tax evasion founded in part upon the admission in evidence of such wagering tax returns.

2. Whether a criminal income tax evasion conviction should be vacated and set aside and a new trial ordered, when this conviction is founded in part upon involuntary confessions of the illegal activity of gambling, and when such illegal activity is admittedly a link in the chain of evidence needed to prosecute and convict in the income tax evasion case.

3. Whether there ever is any justification in law or in fact for a court to refuse to vacate and set aside a criminal conviction after it has become final, when such criminal conviction was obtained in part upon involuntary and coerced statements which were a link in the chain of evidence needed to prosecute and convict.

4. Whether a failure to claim the privilege against self-incrimination at trial when wagering tax returns were offered in evidence, was a waiver of the privilege, where other objection to the admission of the exhibits was made, and where there was no indication or intimation either from the trial record, or the state of the law existing at that time, that the defendant deliberately and knowingly relinquished a known constitutional claim.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED.

1. The Fifth Amendment, United States Constitution.

> "No person . . . shall be compelled in any criminal case to be a witness against himself."

2. The statute under which Petitioner was prosecuted for income tax evasion, though nothing turns on its terms, was Sect. 7201, I.R.C., 1954, which provided as follows:

> "§7201. *Attempt To Evade Or Defeat Tax*
>
> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by his title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with costs of prosecution."

3. The statute under which Petitioner sought post conviction relief was 28 U.S.C. Sect. 2255 which provides as follows:

> "§ 2255. *Federal Custody: Remedies On Motion Attacking Sentence*
>
> "A prisoner in custody under sentence of a court established by Act of Congress claiming the right

to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

"A motion for such relief may be made at any time.

"Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

"A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

"The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

"An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

"An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention."

4. The statutes under which Petitioner could have been prosecuted for failure to file the wagering tax returns are 26 U.S.C. Sects. 7201, 7202, and 7203.

26 U.S.C. 7201 provides:

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

26 U.S.C. 7202 provides:

"Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

26 U.S.C. 7203 provides:

"Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under author-

ity of section 6015 or section 6016), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution."

STATEMENT.

A. Course of proceedings in the underlying criminal trial and in the Sect. 2255 case now before this Court.

On January 21, 1964, Petitioner was found guilty by a jury of willful attempt to evade his income taxes on an indictment of five counts charging violations of 26 U.S.C. Sect. 7201 (I.R.C., 1954) for the years 1956 through 1960 (A. 2-3).[1]

The government proceeded on the net worth theory, i.e. no specific items of unreported income were shown by the government to establish its case.[2]

---

[1] Appellant's Appendix on appeal in the Court of Appeals for the 7th Circuit, and the briefs of the government and Petitioner in that case (*U. S.* v. *Mackey*, No. 14584) have been filed in this Court. Except insofar as they were printed in that Appendix, the government's exhibits admitted at the trial were returned to the government and cannot now be found either by Petitioner or the government. The one exception to this is the 15 representative Forms 730, Wagering Tax Returns which were admitted together with 45 additional Wagering Tax Returns (A. 30-34). The applicable portions of that Appendix have been included in the Appendix filed in this cause (A. 7-25; 40-45).

[2] See *Holland* v. *United States*, 348 U.S. 121.

As the District Court below which tried the criminal case noted in these Sect. 2255 proceedings (A. 27-28):

> "The Government presented its case on the net worth method—it attempted to show that the Petitioner's net worth increased during the subject period in an amount unaccounted for by his reported income and non-taxable sources. A crucial step in prosecuting a case under this method is the establishment of a probable source of the unreported income, in this case 'policy' or gambling. One type of proof offered to establish this probable source of unreported income were Government Exhibits 30 through 89, which were monthly gambling excise tax returns, Form 730, required to be filed by one who is subject to the excise tax on wagering. (Title 26 U.S.C. §4401, Treas. Reg. §44.4011 (a)-1(a)). These returns were objected to at the trial on the grounds that they were inflammatory, prejudicial, and irrelevant, but not on the ground that their admission violated the plaintiff's right against self-incrimination."

On March 24, 1964, the District Court entered judgment and Petitioner was sentenced to five years imprisonment on each count to run concurrently, and was fined $10,000.00 on each count. This judgment and sentence was affirmed by the Court of Appeals for the Seventh Circuit, *United States* v. *Mackey,* No. 14584, 345 F. 2d 499 (1965), and a petition to this Court for a writ of certiorari thereto was denied (382 U.S. 824). Petitioner was serving his sentence when the motion under Section 2255 was filed in the District Court. Petitioner is presently released on parole.

On February 12, 1968, Petitioner filed the motion in the case at bar under 28 U.S.C. 2255 to vacate and set aside his judgment of conviction (A. 2-6). No an-

swer thereto was required by the District Court or filed by the government. Briefs in support and opposition were filed by each of the parties. No hearing was held.

On August 13, 1968, the District Court entered its order denying the Motion under 28 U.S.C. Sect. 2255 (A. 26). On September 6, 1968, the District Court issued its Memorandum in support of this order (A. 27-38).

On October 16, 1968 the parties filed in the Court of Appeals a stipulation containing 15 representative copies of the 60 Form 730, Wagering Tax Returns which are in issue in this cause (A. 40-45).

B. Relevant facts concerning the underlying conviction for income tax evasion.

The relevant facts are contained in Petitioner's Motion under 28 U.S.C. Section 2255 (A. 2-6). During Petitioner's criminal trial in the District Court, the government offered as government's exhibits 30 thru 89 inclusive, sixty (60) monthly Form 730 wagering excise tax returns previously filed by Mackey pursuant to 28 U.S.C. Sect. 4401 and Treas. Reg. No. 44.6011 (a)-1(a), (A. 3, 7-14, 30-34). Petitioner objected to the admission of these returns on the grounds they were offered for the purpose of inflammatory prejudice and bias and for the purpose of getting something into evidence that the Government had otherwise not been able to do (A. 7, 11-12).

The District Court below characterized these exhibits as "somewhat inflammatory" (A. 10) but admitted the returns (A. 12). The Government then argued to the jury that these returns and the summary exhibit (ex. 765) based on these returns showed a likely source of unreported income (A. 16-18), and in the Court of Appeals on ap-

peal in the criminal case argued that the admission of these returns "constituted a part of the Government's case on the important issue of a likely source of unreported taxable income" (A. 4; and see p. 43 of government's brief in the Court of Appeals in *U. S.* v. *Mackey,* No. 14584). In addition, the government concedes this in this Court, and concedes that these returns also contained necessary evidence to provide a foundation for the summary exhibit 765 (Brief in opposition to Petition for Writ of Certiorari, p. 5; and see A. 3, para. 4; 7-16). The District Court below in disposing of Petitioner's motion under Sect. 2255 held that the establishment of a likely source of unreported income was a "crucial step" in prosecuting Petitioner (A. 27).

The trial lasted seven weeks. The jury deliberated five days, averaging more than twelve hours a day (Petitioner's Brief in the Court of Appeals in No. 14584, p. 3).

One important point needs noting here. The Court of Appeals below noted (A. 48) that upon the prior appeal, that Court stated: "Defendant concedes that he was a policy wheel operator during the years in question." This concession was made in briefs and argument in the Court of Appeals on appeal in the criminal case. Petitioner rested at the close of the government's case in the tax evasion trial. The only statement made to the jury by Petitioner's counsel about "policy" was in final argument to the jury in an effort to blunt the prejudicial effect of the admission of the wagering tax returns (Appellant's Appendix in No. 14584, Vol. IV, pp. 1908-1910).

SUMMARY OF ARGUMENT.

I.

This is a coerced confession case. Petitioner was compelled under fear of imprisonment and fines to file wagering tax returns which characterized him as a gambler, and which provided the government with information and figures relative to his gambling income. At the time Petitioner filed these returns, the government was actively using these returns to provide information and evidence in investigating and prosecuting gamblers both for crimes involving gambling and income tax evasion.

These returns admittedly provided an important and crucial link in the chain of evidence needed to prosecute and convict Petitioner. They provided the evidence used by the government to specifically show the jury a likely source of unreported income, and they provided the foundation to support the admissibility of the government's summary exhibit 765. This is conceded by the government, and the District Court below, in these Section 2255 proceedings. Thus, Petitioner's conviction, which is founded in part upon the admission of these involuntary and coerced wagering tax returns, must be vacated and set aside without regard to the truth or falsity of the admissions contained in the returns.

II.

The decisions of *Marchetti* and *Grosso* should be retroactively applied to Petitioner's conviction. Because Petitioner's conviction was obtained through the use of co-

erced and involuntary admissions, his trial was fundamentally unfair in a very real and substantial constitutional sense. This Court has repeatedly and always held that a conviction founded upon a coerced confession or admissions must be vacated and set aside and a new trial ordered.

III.

Petitioner did not waive the privilege of self-incrimination at trial. At the time of his trial, this Court's decisions in *United States* v. *Kahriger,* 345 U.S. 22 and *Lewis* v. *United States,* 348 U.S. 419 were viable and had upheld the statutory scheme for taxing wagers against the claim it violated a person's privilege against self-incrimination. Subsequent to Petitioner's trial, and after his conviction had become final, this Court overruled *Kahriger* and *Lewis* in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, and held that the interrelated, statutory scheme for taxing wagers, including the requirement of filing a wagering excise tax return, violated a person's privilege against self-incrimination. Thus, Petitioner had no privilege which he could waive at trial. He could not and did not intentionally relinquish or abandon a right which he did not have and which was unknowable.

ARGUMENT.

I.

BECAUSE PETITIONER'S CONVICTION WAS OBTAINED THROUGH THE USE OF INVOLUNTARY AND COERCED ADMISSIONS OF A LINK IN THE CHAIN OF EVIDENCE NEEDED TO PROSECUTE AND CONVICT, IT MUST BE VACATED AND SET ASIDE AND A NEW TRIAL ORDERED.

a. Introduction.

The Court of Appeals below affirmed the District Court's denial of Petitioner's motion for a new trial upon the following grounds:

1. Petitioner waived the privilege against self incrimination at trial (A. 49-50).
2. This Court's decisions in *Marchetti-Grosso* are not to be retroactively applied to Petitioner (A. 50-55).
3. The wagering tax returns were not coerced from Petitioner, and the admissions contained therein were true (A. 53).
4. The statutory requirement to file wagering tax returns was impersonal and directed to the public at large (A. 53-54).

The Fifth Amendment literally says that "No person . . . shall be compelled in any criminal case to be a witness against himself." Although Petitioner rested at the close of the government's case in the tax evasion trial, he was compelled to be a witness against himself as if he had been compelled to take the stand and testify that "yes, I am a gambler and have a likely source of unreported income."; and "these are figures relative to my

income from gambling" in order that the government would have a proper foundation for the admission of a summary exhibit. As much as the reasoned opinion from case or authority, the plain language of the Amendment requires a vacation of Petitioner's conviction and a new trial.

The case at bar is not a complex one. It is bottomed upon the mandate of this Court in *Jackson* v. *Denno,* 378 U.S. 368, at p. 376:

> "It is now axiomatic that a defendant in a criminal case is deprived of due process of law if his conviction is founded, in whole or in part, upon an involuntary confession, without regard for the truth or falsity of the confession, *Rogers* v. *Richmond,* 365 U.S. 534, and even though there is ample evidence aside from the confession to support the conviction. *Malinski* v. *New York,* 324 U.S. 401; *Stroble* v. *California,* 343 U.S. 181; *Payne* v. *Arkansas,* 356 U.S. 560."

Compare: *Rogers* v. *California,* 365 U.S. 534, 541; *Lisenba* v. *California,* 314 U.S. 219; *Spano* v. *New York,* 360 U.S. 315.

Each word of this rule is pregnant with meaning to the case at bar. Petitioner's conviction was founded in part upon his coerced and involuntary admissions. The decisions of both Courts below erroneously deemed this not to rise to constitutional significance because the admissions were true and were voluntarily given (A. 42; 21-22). In addition, the Court of Appeals seems to hold (A. 43) that *Sullivan* v. *United States,* 274 U.S. 259 is controlling because the requirement of filing wagering tax returns was directed to the public at large. This is also error in the light of *Marchetti* and *Grosso.*

"We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came and the fervor with which it was defended. Its roots go back into ancient times"; *Miranda* v. *Arizona*, 384 U.S. 436, 458. There, this Court brought into historical fulfillment the full scope of the privilege. In so doing, this Court repeated that the privilege's foundation "is the respect a government—state or federal—must accord to the dignity and integrity of its citizens", so that "our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth"; *Miranda*, at p. 460.

Dean Griswold in his *The Fifth Amendment Today*, (Harvard Univ. Press, 1955) defined the privilege as follows (p. 9):

> "I would like to venture the suggestion that the privilege against self-incrimination is one of the great landmarks in man's struggle to make himself civilized. As I have already pointed out, the establishment of the privilege is closely linked historically with the abolition of torture. Now we look upon torture with abhorrence. But torture was once used by honest and conscientious public servants as a means of obtaining information about crimes which could not otherwise be disclosed. We want none of that today, I am sure. For a very similar reason, we do not make even the most hardened criminal sign his own death warrant, or dig his own grave, or pull the lever that springs the trap on which he stands. We have through the course of history developed a considerable feeling of the dignity and intrinsic importance of the individual man. Even the evil man is a human being."

It is, then, that sense of civility that a mature nation has which gives life and meaning to the privilege against self-incrimination, by raising it as a shield to protect a person against a conviction based on evidence coerced from him. Yet, Petitioner at bar was in fact convicted on testimony wrung from his own mouth under coercion. The privilege must be used in the case at bar as a sword to vacate Petitioner's conviction in order to afford him a trial free from the taint of evidence taken from him by the government in violation of the privilege.

b. This Court has specifically held that the Wagering Tax Statutes were directed at gamblers for the purpose of investigating and prosecuting gamblers.

Miranda v. *Arizona,* 384 U.S. 436 clearly foreshadowed *Marchetti* and *Grosso.* In *Marchetti* and *Grosso,* this Court declined to directly challenge the Congressional intent in enacting a taxing scheme whose major purpose was to secure criminal prosecutions of gamblers both at the state and local level.[3] Instead, it rendered these statutes impotent by holding that if a person were prosecuted for failing to comply with them, the privilege against self-incrimination would bar prosecution. The reason for this appears clear. The statutory scheme was designed to and did in fact coerce confessions of illegal activity from gamblers in order to provide federal and local law enforcement officers with investigatory leads and/or evidence to be used in prosecuting gamblers. *Marchetti* and *Grosso* are permeated with this reasoning, and with the fact that gamblers face "real and appreciable" hazards of providing a "link in the chain of evi-

[3] See the "straight face" statement of Judge Napoli in *United States* v. *Riccio,* (N.D., Ill. 1968) 282 F. Supp. 979, 981.

dence" tending to establish guilt when they complied w
the statutes; *Marchetti*, 390 U.S. at p. 66-67. This w
further emphasized by Mr. Justice Brennan concurri
in *Grosso* where he stated (390 U.S. at p. 73):

> "On the other hand, we know that where the go
> ernment scheme clearly evidences the purpose
> gathering information from citizens in order to secu
> their conviction of crime it contravenes the pri
> lege."

Moreover, in *Marchetti*, this Court noted that Commi
sioner Caplin stated that the I.R.S. was in "full cooper
tion" with the Attorney General to collect the taxes d
on gambling and suppress organized gambling, 390 U.S.
p. 48, referring to Caplin, *The Gambling Business & Fe
eral Taxes*, 8 Crime & Delinquency, 371, 372, 377. In add
tion, Commissioner Caplin made the following comme
in that article (p. 378):

> "Overall, the Intelligence Division investigations
> wagering tax evasion are becoming more effectiv
> . . . Further, our emphasis on significant violato
> has resulted in the convictions of increasing numbe
> of major bookmakers on charges of evasion of wage
> ing taxes *or income taxes* or both. (emphasis sup
> plied)

Hence, the decision of the Court of Appeals below tha
the Wagering Tax Statutes were directed at the publ
at large and that *Sullivan* v. *United States*, 274 U.S. 2
is controlling is clearly erroneous in the light of th
Court's decisions in *Marchetti* and *Grosso*.

c. The Wagering Tax Returns provided a link in the chain of evidence needed to investigate, prosecute and convict Petitioner.

It is true that the wagering tax returns were not used at a trial in which Petitioner was prosecuted for violation of a gambling statute. Rather, they were admitted for the purpose of showing a likely source of unreported gambling income in a prosecution for income tax evasion built upon the net worth theory, and for laying the foundation for the admission of the government's summary exhibit. It was this evidence which furnished the basis for the government's contention, obviously accepted by the jury, that the accused had substantial unreported income from gambling for which he had not paid the required taxes. Were it not for that evidence, the prosecution could not have succeeded in establishing and specifically showing to the jury the source of the difference between the income, including gambling income, reported by defendant in his income tax returns, and the additional gambling income which he allegedly had acquired. Hence, the information furnished by the accused in his wagering tax returns was a vital and indispensable link in the chain of evidence used by the government to prove its case, leading to the conviction of the Petitioner.

It is a well established principle of law that the Fifth Amendment covers both those facts which are a link in the chain of evidence necessary to prove a crime; and those facts which may only be *clues* to the discovery of other facts which in turn would tend to incriminate. II Schwartz, *Rights of The Person*, 830 (MacMillan, 1968); *Counselman* v. *Hitchcock*, 142 U.S. 547, 564, 565, 585; *Malloy* v. *Hogan*, 378 U.S. 1, 11-13; *Albertson* v. *SACB*,

382 U.S. 70, 80; *Murphy* v. *Waterfront Commissioners*, 378 U.S. 52, 79; cf. *Harrison* v. *United States*, 392 U.S. 219. In other words, the privilege against self-incrimination includes not only those facts which provide a link in the chain of evidence necessary to convict; but it also includes facts which can lead to a link to be used against the individual; *Counselman* v. *Hitchcock*, supra; *Blau* v. *United States*, 340 U.S. 159, 161; *Hoffman* v. *United States*, 341 U.S. 479, 486; *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 78, 80; *United States* v. *Coffey*, 2 Cir., 198 F. 2d 438 (1952). As was aptly stated by Judge Learned Hand in *United States* v. *Weisman*, 2 Cir., 111 F. 2d 260, 262 (1940):

> "All crimes are composed of definite elements, and nobody supposes that the privilege is confined to answers which directly admit one of those; it covers also such as logically, though mediately, lead to any one of them; such as are rungs of the rational ladder by which they may be reached. A witness would, for example, be privileged from answering whether he left his home with a burglar's jimmy in his pocket, though that is no part of the crime of burglary."

Here too, the wagering tax returns were "rungs of the rational ladder'" by which evidence of the alleged crime of income tax evasion was reached. If membership in the Communist Party presents sufficient threat of prosecution to support a claim of privilege, then, Petitioner, a gambler, surely had the privilege against "inquiry in an area permeated with criminal statutes where response to any of the form's questions in context might involve [him] in the admission of a crucial element of a crime"; *Albertson* v. *SACB*, 382 U.S. 78, 77-79.

Dean Griswold again illuminates this facet of the case at bar. He postulates the example of a person called

before a Congressional Committee and asked a question touching upon his past membership in the Communist Party. He notes that past membership in the Communist Party is not a crime in itself, but that persons have been prosecuted under the Smith Act for membership in the Communist Party plus something else. He therefore concludes that although the answer to the question admits of no crime, it will definitely incriminate him, and that, therefore, the privilege against self-incrimination is available and can be claimed; Griswold, op. cit., at p. 15 and 16; cf. *Blau* v. *United States,* 340 U.S. 159.

In fact, in a recent case, the Court of Appeals for the 7th Circuit agreed with the argument now being made by Petitioner in this Court. In *United States* v. *Lookretis,* 7 Cir., 398 F. 2d 64 (1968), that Court reversed a conviction of using an interstate facility in aid of unlawful gambling activity upon the authority of *Marchetti* and *Grosso* after remand from this Court. And this Court very recently noted with approval that the Court of Appeals in *Lookretis,* "ruled that *truthful* disclosures made under the compulsion of Sect. 4412 could not be introduced against their maker in a criminal proceeding"; *United States* v. *Knox,* No. 17, December 8, 1969, 38 L.W. 4016, 4017. It is important to note both that the conviction in *Lookretis* was not for the specific crime of gambling, but for a federal crime related to gambling, and in commenting thereon, this Court stated that "[h]owever, the Fifth Amendment was offended in *Lookretis,* precisely because the defendant *had* succumbed to the statutory compulsion by furnishing the requested incriminating information; 38 L.W. at p. 4017.

In the case at bar, the linkage between the information required to be given and its use in a criminal prose-

cution for evasion of taxes on income from gambling is abundantly clear and hardly remote or incredible. In fact, this linkage is admitted by the government. The information elicited in the returns admits one crime, gambling, and provided a logical "link in the chain" of evidence needed to convict Petitioner of another, evasion of taxes on income obtained from that gambling.

d. The Wagering Tax Returns were filed involuntarily and under a coercion recognized by the privilege against self-incrimination.

In ascertaining and evaluating the relation of the Fifth Amendment vis-a-vis the wagering tax returns, it must be remembered that these returns were filed by Petitioner because of the threat of imprisonment which faced him if he failed to do so. We think it obvious that *Marchetti-Grosso* clearly recognized this coercion aspect of the wagering tax statutes. Many years ago, Professor Wigmore said (8 Wigmore, Evidence 345 (McNaughten Rev. 1961)):

> "The policy of the privilege is to regulate a particular government—governed relation—first, to help prevent inhumane treatment of persons from whom information is desired and, second, to satisfy popular sentiment that, when powerful and impersonal government arrays its forces against solitary governed, it would be a violation of the individual's 'sovereignty' and less than fair for the government to be permitted to conscript the knowledge of the governed to its aid."

The case at bar is a clear instance in which the government was permitted to conscript the knowledge of the Petitioner to its aid and to bring about his conviction. As repeatedly stated, had it not been for the produc-

tion and admission into evidence of the wagering tax returns made out by Petitioner, admittedly crucial to the government's case, the crime of income tax evasion could not have been proved. These tax returns were filed by the Petitioner because the law compelled him to do so under the threat of punishment and imprisonment. These returns did not constitute voluntary actions, but represented typical examples of acts in which the individual yielded to the powerful threat of the government. Such evidence, produced under duress, and exacted from the individual under the threat of imprisonment and fines, is clearly a form of coerced confession and its use was in contravention of the privilege against self-incrimination.

The coercion aspect of a confession, of course, goes to the heart of the Fifth Amendment. Long ago, the Supreme Court in *Bram* v. *United States,* 168 U.S. 532, 543 speaking through Mr. Justice White, declared: "[T]he generic language of the amendment was but a crystallization of the doctrine as to confessions, well-settled when the amendment was adopted . . ." Hence, the prohibition against coerced confessions constitutes the touchstone of the Fifth Amendment; it "assures that no incriminating information adduced from a defendant involuntarily by anyone, anywhere, may be admitted into evidence against him"; *Mills* v. *Louisiana,* 360 U.S. 230, 238 (Douglas, J., dissenting).

This Court has upheld throughout the years the privilege as a protection against coerced confessions in any shape or form. Thus, in *Malloy* v. *Hogan,* 378 U.S. 5, 7, it repeated with approval the language of *Bram* v. *United States, supra,* that: "In criminal trials, in the courts of the United States wherever a question arises

whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States commanding that "no person shall be compelled in any criminal case to be a witness against himself."

It is true that the typical cases of coerced confessions involve physical or mental compulsion used by the government while the accused is in custody of the police. However, it is sophistry to draw subtle distinctions between confessions coerced by the application of physical force or psychological pressure, and confessions exacted by the use of threatened fine and imprisonment; or to put it in another way, between in-custody coercion and coercion by the government from without.

The threat of imprisonment has always been considered a coercive device in eliciting evidence to be used against the accused in criminal proceedings. As Mr. Justice Stewart stated in his dissent in *Griffin* v. *California,* 380 U.S. 609, 620 (1965):

> "*Compulsion is the focus of the inquiry.* . . . When a suspect was brought before the Court of High Commission or the Star Chamber, he was commanded to answer whatever was asked of him, and subjected to a far-reaching and deeply probing inquiry in an effort to ferret out some unknown and frequently unsuspected crime. He declined to answer on pain of incarceration, banishment, or mutilation. And if he spoke falsely, he was subject to further punishment. Faced with this formidable array of alternatives, his decision to speak was unquestionably coerced." (emphasis supplied)

In the case at bar, too, the threat of fines and imprisonment for failure to file the wagering tax returns was like a brooding omnipresence in the sky. Utilization

of such coerced evidence in a subsequent related criminal trial was clearly in violation of the basic rights guaranteed to Petitioner by the Fifth Amendment.

The coercive force utilized in the case at bar was indeed far more effective and virulent than the force used in *Garrity* v. *New Jersey*, 385 U.S. 493; *Spevack* v. *Klein*, 385 U.S. 511, and *Slochower* v. *Board of Education*, 350 U.S. 551. In *Garrity*, the Court considered statements coerced because they were given by Police officers under the threat of loss of their positions if they refused to answer the questions submitted to them. In *Spevack* a lawyer's refusal to produce demanded financial records and to testify at a disbarment proceeding, which refusal led to his disbarment, was found to be protected by the privilege against self-incrimination. In *Slochower*, the Court held that a teacher could not be discharged merely because he had invoked the Fifth Amendment before a Congressional Committee, for that sanction would violate the privilege.

If the prospect of the loss of a job constitutes sufficient coercion to violate the privilege against self-incrimination, how much more is this true if the threatened loss of liberty looms on the horizon for the failure to furnish the required forms? As Mr. Justice Douglas stated in *Garrity*, 385 U.S. at 496:

> "The choice imposed on petitioners was one between self-incrimination or job forfeiture. Coercion that vitiates a confession under *Chambers* v. *Florida*, 309 U.S. 227, and related cases can be 'mental as well as physical'; 'the blood of the accused is not the only hallmark of an unconstitutional inquisition.' *Blackburn* v. *Alabama*, 361 U.S. 199, 206. Subtle pressures (*Leyra* v. *Denno*, 347 U.S. 556; *Haynes* v. *Washington*, 373 U.S. 503) may be as telling as

> coarse and vulgar ones. The question is whether the accused was deprived of his 'free choice to admit, to deny, or to refuse to answer.' *Lisenba* v. *California*, 314 U.S. 219, 241."

And he further stated at pp. 497-498:

> "The choice given petitioners was either to forfeit the jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent. That practice, like interrogation practices we reviewed in *Miranda* v. *Arizona*, 384 U.S. 436, 464-465 is 'likely to exert such pressure upon an individual as to disable him from making a free and rational choice.' We think the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions."

The thrust of the three decisions cited above, as well as *Griffin* v. *California*, 380 U.S. 609 is that the Fifth Amendment protects against coercion of incriminating facts from the defendant, and that coercion is found if the assertion of the privilege will subject the accused to a penalty or prove "costly." It is readily apparent that failure to file the wagering tax returns would clearly prove costly to the defendant, by subjecting him to the very real threat of prosecution by the federal government for failure to file; see, e.g. *United States* v. *Costello*, 2 Cir., 352 F. 2d 848 (1965).

Furthermore, the threat of fines or imprisonment was surely as coercive on Petitioner's confession of incriminating facts as the conduct in the typical coerced confession cases of *Greenwald* v. *Wisconsin*, 390 U.S. 519; *Haynes* v. *Washington*, 373 U.S. 503; *Spano* v. *New York*, 360 U.S. 315; or *Clewis* v. *Texas*, 386 U.S. 707.

In *Greenwald,* no physical abuse was alleged, nor any other form of mental or psychological coercion. The accused had not been allowed to see anyone or informed of his rights. This Court found that his confession was *involuntary* without application of the *Miranda* decision. The case is important in showing the liberalization of the concept of involuntary confessions, since there was no physical, mental or psychological pressure, no showing that the defendant had asked for his medicine and been denied it, no showing that he had either asked for food or been told that he would not receive any until he confessed, and the actual questioning time was only three and one-half hours.

In *Haynes,* "a pre-*Miranda* case, this Court found that the confession was obtained in an atmosphere of substantial coercion and inducement, and the totality of circumstances evidenced an involuntary written admission of guilt. Surely, the threat of imprisonment hanging over Petitioner was as strong a compulsion to supply information as the refusal to let the accused in *Haynes* call his wife until he did.

In *Spano,* the compulsion was found from being held eight hours, with no ability to see a lawyer, and with a friend being used to play on the accused's sympathy. In *Clewis,* the compulsion was found from being held over a long period of time, with intermittent questioning, but no physical or mental abuse.

In contrast, while Petitioner in the case at bar was not in custody at the time he confessed, he was faced with almost certain prosecution and, if convicted, imprisonment and fines for the federal offenses of failing to register and failing to pay the taxes involved. It seems

obvious that the in-custody coercion found to vitiate a confession in *Greenwald, Haynes, Spano* and *Clewis,* was far less than the out of custody coercion exerted on Petitioner to secure the admissions used against him at his trial. And, as noted previously, the fact that the wagering tax returns were truthful does not remove them from the protection against their use at trial afforded by the privilege, *United States* v. *Knox,* No. 17, December 8th, 1969, 38 LW 4016, 4017.

Thus, it is respectfully submitted that the conclusion of the Court of Appeals below, that the Fifth Amendment has no application to the case at bar because Petitioner's will was not overborne by physical coercion to lead him to a false admission is most certainly erroneous.

II.

THE DECISIONS OF MARCHETTI AND GROSSO THAT THE COERCED FILING OF THE WAGERING TAX RETURNS VIOLATED PETITIONER'S PRIVILEGE AGAINST SELF-INCRIMINATION MUST BE RETROACTIVELY APPLIED.

It has been previously pointed out that the admission of the wagering tax returns amounted to the use of a coerced confession at the criminal trial. That being so, the decisions of this Court in *Marchetti* and *Grosso* which recognized this fact must be retroactively applied to Petitioner's trial and his conviction therein must be vacated and set aside. For example, in *Brown* v. *Mississippi,* 297 U.S. 278, this Court held that persons who had confessions wrung from them under coercion were entitled to a new trial. It could be hardly argued by any State in this Court that prisoners serving sentences, at the time of *Brown,* under convictions obtained under similar

circumstances, could not avail themselves of the decision in *Brown* for the purpose of obtaining a new trial.

This Court has persistently and continually held to this principle without exception. Thus, in *Davis* v. *North Carolina*, 384 U.S. 737, which is a collateral attack upon a criminal conviction, this Court held that the non-retroactivity of other of its decisions "does not affect the duty of courts to consider claims that a statement was taken under circumstances which violate the standards of voluntariness which had begun to evolve long prior to our decisions in *Miranda* and *Escobedo* v. *Illinois*, 378 U.S. 478" (at p. 740); and see *Jackson* v. *Denno*, 378 U.S. 368 which is another collateral relief case involving a coerced confession.

This principle was reiterated as recently as June 2, 1969 in *Jenkins* v. *Delaware*, 395 U.S. 213. There, this Court, in holding that *Miranda* would not be applied retroactively in the case before it, stated (at p. 221):

> "As we pointed out in *Johnson*, an individual who cannot claim the benefits of *Miranda* may still resort to whatever state and federal procedures are available to insure that statements admitted against him were made voluntarily. Moreover, he may invoke a 'substantive test of voluntariness which, has become increasingly meticulous . . . ."

Further, this Court has on other occasions stated that its decisions would be given retroactive effect where there is a likelihood of coercion present; *Linkletter* v. *Walker*, 381 U.S. 618, 638-639; *Desist* v. *United States*, 394 U.S. 244, 250; or where there has been a wrongful use of a coerced confession; *Tehan* v. *Shott*, 382 U.S. 406, 416.

Thus, under the clear decisions of this Court, Petitioner's conviction must be set aside because it is based

in part upon a coerced confession. This conviction is grossly tainted by evidence obtained through a violation of what is possibly the most ancient and important protection against government afforded to the citizen in the Bill of Rights. That is not to say that the admission of these gambling returns did not also affect the reliability or the integrity of the criminal trial. They did, for who can say whether a jury out for five twelve hour days convicted Petitioner of income tax evasion or, after staring at that stack of 60 forms for that period of time, for being a gambler, cf. *Jackson* v. *Denno*, 378 U.S. 368, 388-389.

But what is most important is that although Petitioner is on appeal in this Court, the privilege against self-incrimination is on trial here. And this privilege is one that has been literally won by the blood of martyrs; see Levy, *Origins of the Fifth Amendment*, (Oxford Univ. Press, 1968). We seriously question whether the government can come forward with a case which has upheld a conviction based upon a coerced confession or admission. To decide in such a way would be to open the door to a host of decisions in criminal trials in which the courts would weigh the truth or falsity of the confession, or would decide whether there was sufficient evidence other than the confession to justify both its admission and the conviction. It would well be then, as this Court stated in *Boyd* v. *United States*, 116 U.S. 616 at p. 635, that such decisions would be an "obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure."

This Court has rigidly respected the shield the Fifth Amendment provides against the use of a coerced confession at trial. The Court of Appeals for the 5th Circuit recognized this in the recent case of *United States* v. *Lucia,* 5 Cir., 416 F. 2d 920, where it vacated a conviction under the retroactively applied authority of *Marchetti* and *Grosso* and stated (p. 925):

> "The purpose of the *Marchetti-Grosso* rule is to protect the constitutional privilege against a statutory system jeopardizing it. The purpose is not to deter unlawful police action. Nor is it to sharpen the fact-finding process. It does not involve guilt or innocence. Indeed, 'The constitutional privilege was intended to shield the guilty and imprudent as well as the innocent and foresighted; * * *.' *Marchetti,* 309 U.S. at 51, 88 S. Ct. at 704. The Supreme Court concluded that the objective of the statute—to force disclosure by punishing silence—was improper. Since the aim of the statute is constitutionally impermissible, courts should not continue to enforce its sanctions. Stated in terms of balancing *Stovall* factors, we consider the preservation of the Fifth Amendment privilege against self-incrimination more important than the fact that the government relied on earlier—now overruled—decisions."

Leonard Levy in his recent *Origins of the Fifth Amendment* (Oxford Univ. Press, 1968), ended this treatise with the following observation (p. 432):

> "*The framers of the Bill of Rights* saw their injunction, that no man should be a witness against himself in a criminal case, as a central feature of the accusatory system of criminal justice. While deeply committed to perpetrating a system that minimized the possibilities of convicting the innocent, they were not less concerned about the humanity that the fundamental law should show even to the offender. *Above*

> *all,* the Fifth Amendment reflected *their* judgment that in a free society, based on respect for the individual, the determination of guilt or innocence by just procedures, in which the accused made no unwilling contribution to his conviction, was more important than punishing the guilty." (emphasis supplied)

We doubt that the judgment of the framers of the Bill of Rights needs disturbing in these times. We believe their judgment requires a new trial in the case at bar. To put it most forcefully concerning this privilege, "[w]ith world events running as they have been, there is special reason at this time for no relaxing the old personal freedoms won, as this one was, through centuries of struggles. . . . There is in it the wisdom of centuries, if not that of decades." *Wood* v. *United States,* D.C., Cir., 128 F. 2d 265, 278-279 (1942) (per Wiley Rutledge, A.J.).

III.

PETITIONER DID NOT WAIVE A KNOWN PRIVILEGE AT TRIAL.

Petitioner did not claim the privilege against self-incrimination at trial because he did not have the privilege available at his trial. This trial occurred during the reign of *Kahriger-Lewis,* and the conviction had become final before *Marchetti-Grosso* was handed down. Petitioner did object to the admission of the wagering tax returns on the grounds they were prejudicial.

The accepted definition of waiver defined by this Court in *Johnson* v. *Zerbst,* 304 U.S. 458 is "an intentional relinquishment or abandonment of a known right or privilege"; at p. 464.

In the recent case of *United States* v. *Lucia*, 5 Cir., 416 F. 2d 920 (1969), the defendant had pleaded guilty to an indictment charging him with failure to file wagering tax returns. After serving his sentence, and after *Marchetti-Grosso*, he sought post conviction relief much the same as Petitioner did here which was denied. The government raised the issue of waiver of the privilege as it does here. The Court of Appeals held there was not and could be no waiver of the privilege (p. 922):

> "Lucia had no knowledge of his right against self-incrimination under the *Grosso* and *Marchetti* rule for, at the time, those cases had not been decided. In earlier cases, *United States* v. *Kahriger*, 1953, 345 U.S. 22, 73 S. Ct. 510, 98 L. Ed. 754, and *Lewis* v. *United States*, 1955, 348 U.S. 419, 75 S. Ct. 415, 99 L. Ed. 475, the Supreme Court had rejected the contention that the prosecution under the federal gambling tax scheme violates the Fifth Amendment. Lucia, therefore, could not have 'knowingly and intentionally' waived his privilege against prosecution: that privilege did not exist. *Johnson* v. *Zerbst* and *Miranda* v. *Arizona* invalidate the waiver of rights that the defendant's own inexperience or ignorance prevent him from knowing. By logical extension, these decisions rule out all the more strongly the waiver of a right, such as Lucia's that is unknown not because of any infirmity on the defendant's part, but because it is unknowable."

In *Leary* v. *United States*, 395 U.S. 6, 27-28 this Court held that a failure to assert the privilege at trial was not a waiver of the privilege because, "Petitioner's trial occurred before our decisions in *Marchetti*, *Grosso* and *Haynes*. . . ." (p. 27)

In *Miranda* v. *Arizona*, 384 U.S. 436, this Court noted that a failure to object to the confession at trial was not

a waiver and did not preclude its consideration by this Court since the trial was held prior to *Escobedo* and its decision that day; 384 U.S. at p. 495, fn. 69.

In *Grosso,* this Court noted that a failure to claim the privilege was not a waiver because of the prior decisions of *Kahriger* and *Lewis;* 390 U.S. at p. 70-71.

In fact, as the court in *Lucia* notes, several lower courts in post *Marchetti-Grosso* cases have rejected the argument that failure to claim the privilege with respect to wagering tax returns constituted a waiver of the privilege; 416 F. 2d at p. 923-924 and cases cited therein. The Court further notes that although these cases were all direct appeals cases, their rationale was applicable to *Lucia,* and, of course, is equally applicable here.

The rule laid down in the above cited cases simply makes sense. If waiver is abandonment of a known right, then one simply cannot abandon the unknowable. To put it in another way, in order to waive a constitutional right at trial, there must be a deliberate design, or a strategic trial choice, to forego a known constitutional claim; *United States* v. *Meyers,* 276 F. Supp. 748 (E.D., Pa., 1967). It certainly cannot be argued that Petitioner or his counsel deliberately allowed these Forms 730 in evidence as a deliberate design or a strategic trial choice. Their admission was vigorously objected to on the grounds they would prejudice the jury. Given the state of the law as laid down in *Kahriger* and *Lewis,* which was applicable at the time of Petitioner's trial, this was the only reasonable and known objection that could be made to their admission at that time. Thus, there was no waiver of a known constitutional right at Petitioner's trial.

CONCLUSION.

For the reasons hereinabove stated, the Judgment of the Court of Appeals for the Seventh Circuit affirming the order of the United States District Court for the Northern District of Indiana should be reversed, and this cause should be remanded to the United States District Court for the Northern District of Indiana with directions to vacate and set aside its order denying Petitioner's motion for relief under 28 U.S.C. Section 2255 and to enter its order granting Petitioner a new trial.

Respectfully submitted,

WILLIAM M. WARD
39 S. LaSalle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner,
Fred T. Mackey

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statement	2
Summary of argument	12
Argument:	
I. Since the wagering tax forms claimed to have been erroneously admitted were not of great significance in proving petitioner's guilt, alleged error in their admission at trial should not be deemed cognizable under 28 U.S.C. 2255	15
II. The rationale of *Marchetti-Grosso* does not preclude the admission into evidence of wagering tax forms in a prosecution for income tax evasion	21
III. The rationale of *Marchetti-Grosso* should not be applied retroactively to convictions which had become final prior to the date of those decisions	26
Conclusion	32

CITATIONS

Cases:	
Albertson v. *SACB*, 382 U.S. 70	25
Arsenault v. *Massachusetts*, 393 U.S. 5	28
Blackburn v. *Alabama*, 361 U.S. 199	18
Brown v. *Walker*, 161 U.S. 591	23
Bryson v. *United States*, No. 35, this Term, decided December 8, 1969	21
Carafas v. *LaVallee*, 391 U.S. 234	30
Chapman v. *California*, 386 U.S. 18	16, 20
Desist v. *United States*, 394 U.S. 244	27, 29
Fay v. *Noia*, 372 U.S. 391	18
Friedberg v. *United States*, 348 U.S. 142	2
Gideon v. *Wainwright*, 372 U.S. 335	28
Graham v. *United States*, 407 F. 2d 1313, petition for certiorari pending, No. 294 Misc., this Term	31

377-691—70——1

Cases—Continued

Page

Grosso v. *United States*, 390 U.S. 62 ..... 2, 12, 13, 14, 15, 19, 21, 22, 23, 24, 25, 26, 29, 30, 31
Halliday v. *United States*, 394 U.S. 831 27
Harrington v. *California*, 395 U.S. 250 ..... 16, 18, 20
Haynes v. *California*, 373 U.S. 503 18
Holland v. *United States*, 348 U.S. 121 ..... 2, 17
Jackson v. *Denno*, 378 U.S. 368 ..... 18, 28
Johnson v. *New Jersey*, 384 U.S. 719 28
Kaufman v. *United States*, 394 U.S. 217 ..... 13, 15, 16, 20
Kramer v. *Commissioner*, 389 F. 2d 236 17
Lewis v. *United States*, 348 U.S. 419 ..... 19, 29
Linkletter v. *Walker*, 381 U.S. 618 27
Marchetti v. *United States*, 390 U.S. 39 ..... 2, 12, 13, 14, 15, 19, 21, 22, 23, 24, 25, 26, 27, 29, 30, 31
Masterson v. *United States*, 293 F. Supp. 787 31
Miranda v. *Arizona*, 384 U.S. 436 28
Minor v. *United States*, No. 189, this Term, decided December 8, 1969 23
Payne v. *Arkansas*, 356 U.S. 560 18
Regina v. *Boyes*, 1 B. & S. 311 23
Roberts v. *Russell*, 392 U.S. 293 28
Rogers v. *United States*, 340 U.S. 367 23
Sibron v. *New York*, 392 U.S. 40 30
Smith v. *United States*, 348 U.S. 147 2
Stovall v. *Denno*, 388 U.S. 293 27
Tehan v. *Shott*, 382 U.S. 406 28
Townsend v. *Sain*, 372 U.S. 293 ..... 15, 18
United States v. *Calderon*, 348 U.S. 160 2
United States v. *Costello*, 221 F. 2d 668, affirmed on other grounds, 350 U.S. 359 31
United States v. *Covington*, 395 U.S. 57 21
United States v. *Kahriger*, 345 U.S. 22 ..... 19, 29
United States v. *Knox*, No. 17, this Term, decided December 8, 1969 ..... 25, 26
United States v. *Lucia*, 416 F. 2d 920 30
United States v. *Lookretis*, 398 F. 2d 64 24
United States v. *Massei*, 355 U.S. 595 17
United States v. *Sclafani*, 265 F. 2d 408, certiorari denied, 360 U.S. 918 17
United States v. *Sullivan*, 274 U.S. 259 ..... 17, 25, 26

Statutes: Page
18 U.S.C. 1001 25
26 U.S.C. 4401 22
26 U.S.C. 4411 29
26 U.S.C. 4412 29
26 U.S.C. 4744 21
26 U.S.C. 6072 23
26 U.S.C. 7201 2
28 U.S.C. 2255 ..... 2, 12, 15, 20, 21
Miscellaneous:
Annual Reports of the Commissioner of Internal Revenue 30
Treasury Regulation 44.6011(a)–1(a) (26 C.F.R. 44.6011(a)–1(a)) 22
Treasury Regulation 44.6071–1(a) (26 C.F.R. 44.6071(a)–1(a)) 23

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 529

FRED T. MACKEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (A. 47–55) is reported at 411 F. 2d 504. The opinion of the district court (A. 27–38) is unreported. The opinion of the court of appeals on direct review of petitioner's conviction is reported at 345 F. 2d 499 (C.A. 7), certiorari denied, 382 U.S. 824.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 1969. The petition for a writ of certiorari was filed on August 29, 1969, and certiorari was granted on December 8, 1969. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in a prosecution of an admitted gambler for evading payment of income taxes, the admission into evidence of his monthly wagering tax forms was error which may be collaterally attacked under 28 U.S.C. 2255.

2. Whether the rationale of *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, precludes the admission into evidence of wagering tax forms in an income tax evasion prosecution.

3. Whether the rationale of *Marchetti-Grosso* should be applied retroactively to convictions which had become final before the date of those decisions.

STATEMENT

In March 1963 petitioner was charged with five counts of income tax evasion for the years 1956 through 1960, by causing false returns to be prepared, in violation of 26 U.S.C. 7201. After a jury trial, he was convicted on all counts and sentenced to concurrent terms of imprisonment for five years and a $10,000 fine.

1. Proceeding under the net worth of proof,[1] the government showed that at the starting point, December 31, 1955, the apparent net worth of petitioner and his wife was $361,461.52, a figure substantially

[1] This method was approved in this Court's decisions in *Holland* v. *United States*, 348 U.S. 121; *Friedberg* v. *United States*, 348 U.S. 142; *Smith* v. *United States*, 348 U.S. 147; and *United States* v. *Calderon*, 348 U.S. 160, and is described in some detail in *Holland*, *supra*, 348 U.S. 121, 125.

greater than all of the income reported by them since 1929 (A.A. 1342–1363, 1422–1423).[2] The assets attributed to petitioner and his wife on that date included cash, government bonds, secured and unsecured loans receivable, real estate and stocks. Some of these items were not held in petitioner's name, but ownership was traced to him through proof that he had furnished the funds to purchase them (Govt. Exh. 800, A.A. 2103). The bulk of such traceable property consisted of loans and mortgages which petitioner had made to individuals through a corporation he controlled, Gibraltar Industrial Life Insurance Co. (A.A. 2128).[3] Other assets traced to petitioner had been purchased by relatives and friends with cash provided by petitioner. Title to real estate was often recorded in the name of petitioner's "nominee" (see, *e.g.*, A.A. 378, 421, 576).

For the tax years 1956 through 1960, petitioner and his wife filed returns reflecting taxable income totalling $143,339.24, upon which they paid income tax in the amount of $38,622.41 (A.A. 2153). The trial testimony and numerous exhibits disclosed that from 1956

[2] "A.A." refers to the four-volume appellant's appendix which was compiled along with a short appellee's appendix ("G.A.") when the case was on direct appeal, and which has been included as part of the record filed with the Clerk of this Court.

[3] Petitioner gained control of Gibraltar Industrial in 1947 and was chairman of its board during the years specified in the indictment (A.A. 499–501, 1572–1573). He installed his relatives as officers and managers of the company. Petitioner's sister, Mrs. Fanny Benford, served as treasurer and was made responsible for all of the company's funds, despite a limited formal education, no bookkeeping experience and a total unawareness of the most elementary accounting terminology (A.A. 1219–1221).

through 1960, petitioner acquired more than $1,000,000 in new assets, continually shielding his possessory interest by the use of nominees, particularly two new corporations he caused to be created, Gibraltar Mutual Life Insurance Company and M.W.E. & S. (originally M.W. & E.) Investment Company,[4] as well as Gibraltar Industrial.

Petitioner argued that the assets imputed to him actually belonged to the corporations. However, the federal income tax returns of Gibraltar Industrial, Gibraltar Mutual and M.W.E. & S. and the annual

[4] Gibraltar Mutual was organized by petitioner in 1954 with a $35,000 investment. Petitioner added $5,000 to that capital in 1959 and $13,000 in 1960 (A.A. 296–297, 299). The company's officers consisted of the five relatives of petitioner (who was chairman of the board) listed as officers of Gibraltar Industrial (G.A. 35–40). Mrs. Benford served as treasurer and office manager. The other company, M.W.E. & S., was organized prior to 1957 as a sole proprietorship and incorporated in that year (A.A. 1266). It purported to serve as an investment company, particularly for funds of the Gibraltar companies (A.A. 260–261, 1266–1267). All three corporations utilized the same office, and some of the same employees who collected premium income for the Gibraltar companies collected money for M.W.E. & S. (A.A. 368, 615–616, 862–863, 1057). There was evidence that transactions and funds of the insurance companies were sometimes commingled with those of petitioner and M.W.E. & S. (A.A. 346, 452–453, 795–796; G.A. 27). The Gibraltar Building, whose title was held in the name of Gibraltar Industrial and whose cost of construction was paid for by petitioner in cash, was reported each year as an asset of M.W.E. & S. (A.A. 311–315, 786–788, 794). Petitioner in 1958 created a fictitious $200,000 mortgage liability on the building (A.A. 358–359, 1341). The federal income tax returns of M.W.E. & S. (Govt. Exhs. 14, 15, 16) showed the value of the property as $300,000, and a reduction in the mortgage encumbrance to $160,000 by 1960 (A.A. 883, 885–887). The returns were prepared by an attorney from information provided by petitioner (A.A. 885–886).

reports submitted to the State of Indiana by the two insurance companies covering the period 1956–1960 indicated that Gibraltar Industrial operated at a loss amounting to more than $27,000 and never had gross income in excess of $64,000 in any one year. For the same period Gibraltar Mutual lost approximately $800 on a maximum annual gross income of about $43,000, and M.W.E. & S. had a total net income of $39,971.35 (Govt. Exhs. 14–16, 125–129, 140–144; A.A. 257–264, 277–278, 305–309). Moreover, the annual statements of the insurance companies, which were prepared from information furnished by petitioner or his relatives, did not list any securities or real estate as owned by the companies (A.A. 784–785, 802–803). Utilizing this and similar information, the government's proof established that petitioner's taxable income for the years 1956 through 1960 was $1,148,434.86, and that the correct amount of income tax was $777,959.48.[5]

[5] Under the government's proof, the amounts of taxable income and income tax liabilities reported on petitioner's returns for each of the years in question, compared with the correct amounts as proved at the trial, are as follows (Govt. Exhs. 9–13, 800–802; A.A. 2103–2153):

Taxable income

Year	Correct amount	Reported amount	Unreported income
1956	$209, 108. 95	$17, 315. 54	$191, 793. 41
1957	350, 681. 63	13, 452. 72	337, 228. 91
1958	378, 408. 95	33, 884. 68	344, 524. 27
1959	138, 157. 27	39, 593. 38	98, 563. 89
1960	72, 078. 06	39, 092. 92	32, 985. 14
Total	1, 148, 434. 86	143, 339. 24	1, 005, 095. 62

(Footnote continued on p. 6.)

377-691—70——2

2. At the opening of the prosecution's case government counsel offered in evidence the income tax returns filed by petitioner for the calendar years 1949 through 1960 (Govt. Exhs. 1–13). With respect to the 1956–1960 returns (Govt. Exhs. 9–13), defense counsel objected to the admission of portions of Supplementary Schedule C forms ["Profit (or loss) from Business or Profession"] which identified certain income as having come from "policy" operations, on the ground that it would prejudice petitioner by showing a violation of State gambling laws (A.A. 224–227). The court reserved its ruling on this objection at that time (A.A. 227). Shortly thereafter, the discussion between the court and counsel turned to Government Exhibits 30–89, which comprised 60 monthly wagering excise tax returns (Form 730, App. 41–45) filed by petitioner for the five years covered by the indictment (A.A. 228–229). Defense counsel objected to their admission into evidence on the ground of inflammatory prejudice and because the information on the forms could be found on Schedule C forms accompanying the annual income tax returns (A.A. 230). The court determined that the wagering tax forms

Income tax

Year	Correct amount	Reported amount	Unreported tax
1956	$134, 508. 61	$3, 209. 08	$131, 299. 53
1957	255, 277. 42	2, 015. 45	253, 261. 97
1958	279, 213. 45	9, 353. 31	269, 860. 14
1959	77, 456. 38	12, 097. 89	65, 358. 49
1960	31, 503. 62	11, 946. 68	19, 556. 94
Total	777, 959. 48	38, 622. 41	739, 337. 07

would be admitted if the government could show that they contained matter not reported on the Schedule C forms (A.A. 231), and reserved ruling on their admission.

The first government witness, Frank J. Smith, stated that he was the accountant who had prepared the income tax returns signed by petitioner and filed for the period 1956–1960. His testimony consisted of a review of the matters reported on those returns, including the supplementary schedules. As part of his discussion, Mr. Smith identified the wording set forth on line A on one of the Schedule C forms supplementing the 1956 return (Govt. Exh. 9) as "Principal business activity colon policy operator" (A.A. 233). Defense counsel's objection to that identification on the grounds of prejudice and lack of foundation was overruled (A.A. 233–234). Mr. Smith testified that he had placed the description and amounts—which he had transposed from books furnished by petitioner—on the schedule. Similar recitations that petitioner had obtained income from the business of "policy operator" or "policy wheel" were noted on the Schedule C forms accompanying Government Exhibits 10 through 13, the returns for 1957 through 1960 (A.A. 248–250). In addition, Mr. Smith testified that he prepared wage and tax statement (W–2) forms for petitioner's employees, some of whom were carried as engaging in the policy business (A.A. 246). Over defense counsel's objection Government Exhibits 9–13 were admitted into evidence (A.A. 244, 256).

More than 60 witnesses had testified before any

further reference was made to petitioner's involvement in a gambling enterprise. The renewal of discussion on this matter came about during the testimony of petitioner's secretary, Laura McComb, after she had stated without objection that she knew Frank J. Smith and had furnished him the copies of Government Exhibits 52–89 (monthly wagering tax forms) which petitioner had retained, as well as a ledger she had kept containing information received from petitioner relating to those exhibits (A.A. 662). Following this testimony government counsel once more offered Government Exhibits 52–89 into evidence. A brief discussion was held between the court and counsel, resulting in the continued reservation of a ruling because the previously stated condition for admitting the monthly wagering tax forms—*i.e.*, that they be shown not to be merely cumulative of what was reported on the Schedule C forms of the income tax returns—had not been satisfied (A.A. 667–669).

The matter of admitting the wagering tax forms was not raised again until approximately 20 more witnesses had completed their testimony and the government called to the stand its final witness, Edward Harrington, an Internal Revenue Service technical adviser.[6] At the outset of his lengthy testimony Har-

[6] Shortly before Harrington's testimony, IRS Agent Kenneth Brunk testified without objection that in April 1960 he interviewed petitioner, at which time petitioner identified his occupation as a "policy operator," but on advice of counsel declined to answer any questions pertaining to his net worth. Evidently there was no discussion between them relating to the wagering tax forms whose admission into evidence is now being challenged (A.A. 1339–1342).

rington was asked to identify Government Exhibit 765, which he had prepared, showing a difference between the yearly totals of the "Gross amount of wagers," as reported on petitioner's monthly wagering tax forms, and the amounts reflected on the Schedule C forms as "Total receipts, less allowances, rebates and returns," for the years in question. Defense counsel objected to the exhibit as inflammatory, contending that petitioner was not on trial for any inaccuracy in the wagering tax forms (A.A. 1364–1365). However, since the totals of the amounts on the monthly wagering tax forms were not the same as the totals of the net receipts from policy operations as reported on the income tax schedules, the court determined that Government Exhibits 30–89, as well as 765, should be admitted into evidence (A.A. 1368–1370). The witness then proceeded to explain his computations for 1956, showing that the total of "[g]ross amount of wagers" reported on the monthly forms was $142,668.25; the expenses for petitioner's policy operations as reported on Schedule C were $19,662.93; and that the balance, $123,005.32, exceeded the net profit from gambling reported on Schedule C ($15,977.71) by $107,027.61 (A.A. 1371–1372). Harrington stated that Exhibit 765 contained similar computations for the remaining years listed in the indictment (A.A. 1372–1373). On cross-examination, the witness stated that he had no personal knowledge of petitioner's actual expenses in the policy business, and that the net difference for 1956 as reflected on Exhibit 765, $107,027.61, could not

have accounted for the entire adjusted gross income asserted by the government for that year ($209,108.95) (A.A. 1626, 1665–1668, 2152). The witness also acknowledged that he was aware that the income tax schedules had been prepared by an accountant, Mr. Smith (who had testified that the "Total Receipts" figures on the Schedule C forms represented gross wagers (on which the 10-percent excise tax is paid) minus payoffs) (A.A. 245, 1910).

At the conclusion of the prosecution's case, petitioner moved for an acquittal, citing as one of the reasons the court's admission of the wagering tax forms. Government counsel argued that they were admissible to show a likely source of omitted income (A.A. 1846–1848, 1853). Petitioner's motion was denied, and the defense rested. In closing argument government counsel "invited" the jury to review the documentary evidence, including the wagering tax forms (A.A. 1875). Defense counsel argued that the government had failed to produce any direct evidence of a source of income capable of producing assets in the amount alleged (A.A. 1886–1887). He pointed to evidence that petitioner had engaged in three occupations, including that of a policy operator, but asserted that petitioner was not on trial for violating the Indiana gambling laws; that no witnesses had testified regarding any improprieties in petitioner's reported earnings from the policy business; and that the only purpose served by such evidence was to prejudice his client (A.A. 1908–1910). In rebuttal, government counsel explained the meaning of Exhibit

765 and suggested that it showed a likely source for the undisclosed increase in petitioner's net worth (A.A. 1920–1921). Government counsel also suggested other sources, including unreported stock dividends, interest payments on loans, rental income and other receipts purported to be collected by M.W.E. & S. (A.A. 1921–1922).

In its closing charge the court instructed that neither the fact that petitioner had engaged in the policy business, nor the issue whether that occupation violated State law, should be considered in any manner whatsoever in determining whether he was guilty as charged in the indictment, and that the "sole question" to be resolved by the jury was set forth in the indictment (A.A. 1931). If the jury found that petitioner had received taxable income which he did not report on his annual income tax returns for the years 1956 through 1960, it made no difference whether the income had been lawfully or unlawfully received (A.A. 1948). The court stressed that petitioner could not be found guilty because he committed some act of misconduct not charged (A.A. 1952). The jury began its deliberations on the evening of January 17, 1964, and returned a verdict of guilty on all counts on the afternoon of January 21 (A.A. 1970–1978).

3. On direct appeal to the Seventh Circuit petitioner continued to claim that the admission into evidence of his wagering tax forms was prejudicial error. However, he did not renew that contention in his petition for a writ of certiorari seeking review

of the court of appeals' affirmance of his conviction (No. 216, 1965 Term). Petitioner began serving his sentence in December 1965, after certiorari was denied by this Court.

On January 29, 1968, this Court announced its decisions in *Marchetti* v. *United States,* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62, holding that one charged with violating the federal wagering tax laws could assert the privilege against self-incrimination as a complete defense to prosecution for noncompliance. Relying upon these decisions, petitioner filed a motion to vacate his sentence, pursuant to 28 U.S.C. 2255, in February 1968, claiming that the trial court had erred in admitting his wagering tax forms into evidence because he had filed them under compulsion of a legal command which the government could not properly impose. The lower courts denied relief, largely upon the ground that petitioner's failure to assert this claim at trial constituted a waiver, and that petitioner's attempt to avoid the consequence of waiver by seeking to rely on the holdings in *Marchetti* and *Grosso* was inappropriate, since those decisions should not be applied retroactively.

SUMMARY OF ARGUMENT

I

The wagering tax forms, while relevant, were not a vital and indispensable part of the government's case against petitioner for income tax evasion. Other clearly admissible evidence disclosed that during the taxable years in question petitioner had engaged in sev-

eral occupations, including gambling, all of which served as likely sources from which undisclosed taxable income could arise. This is all that the government was required to show under the net worth method of proof. The sole purpose of introducing the wagering tax forms was to strengthen the proof of gambling as a likely source. The evidence the forms provided could not have been the principal reason that the jury found petitioner guilty of income tax evasion. Had the issue now presented regarding the admission of the forms in evidence arisen on direct appeal, the court of appeals would have been justified in finding any error in admission to have been non-prejudicial. In these circumstances, the same question raised on collateral attack for the first time should not be deemed cognizable, even under the standards enunciated in *Kaufman* v. *United States,* 394 U.S. 217.

II

Even if petitioner's claim is cognizable, he is not entitled to relief on the basis of this Court's decisions in *Marchetti* v. *United States* 390 U.S. 39, and *Grosso* v. *United States,* 390 U.S. 62. Those cases held only that gamblers charged with failing to comply with the registration and payment requirements of the federal wagering tax laws could assert the privilege against self-incrimination as a complete defense to criminal prosecution for non-compliance. That was so, the Court concluded, because those laws required that information which could prove a significant link in a chain of evidence tending to establish violations of other State and

federal laws relating to gambling be provided to the government. Nothing in *Marchetti-Grosso* extinguishes civil liability for non-compliance with the wagering tax laws. Nor should those cases preclude the admission of wagering tax forms into evidence at a trial for income tax evasion. Any risk of self-incrimination in such a context from a requirement to file the forms is imaginary and insubstantial. A subsequent and essentially unrelated criminal act—violation of the income tax laws—is necessary before such forms could even be relevant in the income tax context. Nor should the forms be excluded simply because they had initially been filed under the generalized compulsion inherent in any taxing scheme.

III

At all events, the rationale of *Marchetti-Grosso* should not be applied retroactively so as to upset convictions which had become final prior to the date of those decisions. This should certainly be so as to convictions, such as the one here, which are for violations outside the wagering tax context. This conclusion follows from an application of the three criteria established by the Court for determining retroactivity. The rule of *Marchetti-Grosso,* grounded as it is on the Fifth Amendment's privilege against self-incrimination, falls within a category of cases involving protection of the right of privacy, a value which, while important, does not furnish a basis for retroactive application of decisions relating to it. Law enforcement authorities manifestly were justified in believing, prior to *Marchetti-Grosso,* that a defense of self-incrimina-

tion would not prevail. Finally, retroactive application of *Marchetti-Grosso* would have a substantial impact on the administration of justice.

ARGUMENT

I. SINCE THE WAGERING TAX FORMS CLAIMED TO HAVE BEEN ERRONEOUSLY ADMITTED WERE NOT OF GREAT SIGNIFICANCE IN PROVING PETITIONER'S GUILT, ALLEGED ERROR IN THEIR ADMISSION AT TRIAL SHOULD NOT BE DEEMED COGNIZABLE UNDER 28 U.S.C. 2255

As an initial matter, the instant case presents a problem of more general importance than merely the question of the scope and retroactivity of the *Marchetti-Grosso* decisions. That problem is the extent to which a conviction which has been fully reviewed on appeal is subject to collateral attack because a particular item of evidence, whose introduction was not objected to on constitutional grounds at trial or on appeal, is subsequently challenged as having been obtained in violation of constitutional rights. In *Kaufman* v. *United States*, 394 U.S. 217, and *Townsend* v. *Sain*, 372 U.S. 293, this Court held that claims of constitutional error in the admission of evidence may be challenged in collateral proceedings, despite the failure to raise the issue at trial or on appeal. Because of those rulings, we suggest, it is important that this Court provide guidelines for lower federal courts regarding what claims of error in the admission of evidence should, and what need not, be considered upon collateral attack of a criminal conviction.

The instant case is an excellent illustration, we submit, of the anomaly which can result from a lit-

eral and uncritical application of the *Kaufman* doctrine to any evidence introduced at a federal criminal trial. The wagering tax returns whose admissibility is challenged in this proceeding, while clearly relevant as the government has consistently maintained, were not, in view of all the other evidence showing income tax evasion, of great significance to the government's case against petitioner. Had a constitutional challenge been raised at trial,[7] the government might very well have decided to forego introducing them into evidence. Alternatively, had the constitutional issue been raised on direct appeal, the court of appeals would have been justified in finding the error harmless beyond a reasonable doubt under the standard of *Chapman* v. *California,* 386 U.S. 18, as explicated in *Harrington* v. *California,* 395 U.S. 250. If admissibility of these items of evidence would not necessarily have constituted error requiring reversal on direct appeal, their admission at trial should not, we submit, constitute a basis for collateral attack after the conviction has become final.

At petitioner's trial the crucial issue was whether assets purchased with funds allegedly traced to petitioner belonged to him or to the putative purchasers. Some 85 government witnesses, including relatives and friends of petitioner, gave testimony regarding numerous specific investments during and before the years covered in the indictment. From these investments substantial unreported (and clearly taxable)

[7] Petitioner's objection at trial to the admission of the wagering tax forms was founded solely on the ground that they were inflammatory (see Pet. Br. 8).

income was derived, in the form of rental receipts, cash dividends and the like. This evidence alone satisfied the requirement that the government in net worth cases show some likely source from which the currently taxable income arose. *Holland* v. *United States*, 348 U.S. 121, 138; *United States* v. *Sclafani*, 265 F. 2d 408 (C.A. 2), certiorari denied, 360 U.S. 918; cf. *United States* v. *Massei*, 355 U.S. 595; *Kramer* v. *Commissioner*, 389 F. 2d 236 (C.A. 7). Beyond this, the government established another possible source when it introduced into evidence petitioner's federal income tax returns for the years covered by the prosecution. On these returns petitioner had identified himself as a policy operator. Cf. *United States* v. *Sullivan*, 274 U.S. 259, 263. This clearly admissible evidence that petitioner was engaged in the business of gambling, coupled with his admission to that effect to an agent of the Internal Revenue Service, provided ample proof of gambling as another likely source of income. The wagering tax forms may have strengthened the proof in this area but they did not, as petitioner maintains, constitute a vital and indispensable portion of the case against him (Pet. Br. 17).[8] Like

[8] Petitioner's intimation that the jury, after deliberating for several days, might well have decided to convict him because of the presence of his 60 wagering tax forms (Pet. Br. 28) is, we believe, effectively refuted by reference to the court's instructions on the limited consideration to be given to the evidence of gambling (see *supra*, p. 11). Moreover, the jury's request to the court after some deliberation for a clarifying instruction—on whether it was necessary to prove the *exact* amount of unreported income as alleged in the indictment—provides some indication of the particular matter upon which they were deliberating.

the evidence introduced in *Harrington* v. *California, supra,* the evidence as to a likely source of petitioner's unreported income was "so overwhelming" (*id.* at 254) even without the wagering tax forms that his conviction should be upheld unless the Court were to determine that any departure from constitutional procedures requires reversal. This it refused to do in *Harrington.*

The rule that admissibility of evidence may be challenged on constitutional grounds despite the failure to raise the issue at trial or on appeal was initially adopted with respect to confessions, found to have been coerced, in which an accused admitted his guilt of a serious crime. *Fay* v. *Noia,* 372 U.S. 391; *Townsend* v. *Sain,* 372 U.S. 293. The impact of that type of confession on the ultimate judgment of guilt was so self-evident that the Court had no occasion to consider the extent to which the availability of collateral relief should depend on the relationship of the challenged evidence to the whole proof at the trial. Moreover, the normal impact of an actual confession is decisive and the repugnance of coerced confessions is so substantial that, even on direct review, courts have not undertaken to measure degrees of prejudice. *E.g., Payne* v. *Arkansas,* 356 U.S. 560, 568; *Blackburn* v. *Alabama,* 361 U.S. 199, 205–208; *Haynes* v. *Washington,* 373 U.S. 503, 517–520; *Jackson* v. *Denno,* 378 U.S. 368, 376.

Petitioner strains to bring this case within those rulings by arguing that his wagering tax forms, filed under the compulsion of a federal statute, in effect constituted a coerced confession because, when he filed

them, he did not intelligently and knowingly waive his privilege against self-incrimination. As the court of appeals correctly pointed out, however, "the compulsion which turns interrogation into a violation of the privilege against self-incrimination is not the same as the coercion and intimidation which make a confession involuntary and a denial of Due Process" (A. 53). There was here neither the physical or psychological intimidation nor the trickery involved in the typical coerced confession cases. Indeed, as the court below also noted (A. 50), the decisions in *United States* v. *Kahriger,* 345 U.S. 22, and *Lewis* v. *United States,* 348 U.S. 419, did not directly involve the wagering excise tax provision, and thus did not necessarily preclude, by their holdings, the opportunity to challenge the requirement of filing wagering tax returns, as was done in *Grosso.* Even if it be assumed that, had petitioner gone to trial after the effective date of *Marchetti-Grosso* he could have prevailed in his attempt to exclude from evidence his wagering tax forms filed before those decisions by asserting that he had not knowingly waived the privilege, it is nevertheless clear that such returns cannot in any realistic sense be deemed to be the equivalent of a coerced confession where the will of the confessor in custody is overborne by force, intimidation or deceit. Unlike the situation in the typical coerced confession cases, therefore, there is no reason here to fail to take into account the relationship of the challenged evidence to the case as a whole. And since, as we have shown, the admission into evidence of the wagering tax forms could prop-

erly have been deemed harmless error on direct appeal, it should not be held to furnish the basis for a collateral attack under 28 U.S.C. 2255.

We suggest that it would be appropriate in this case for the Court to make it clear that, with respect to a claim that inadmissible evidence was introduced at trial (except a claim as to a coerced confession obtained from a defendant in custody), the moving party, if he failed to raise the issue at trial or on appeal, must make an affirmative showing that the challenged evidence played a significant part in bringing about his conviction. At the very least, if it is determined that admission of challenged evidence could properly have been deemed harmless error on appeal, under the standard of *Chapman* v. *California,* 386 U.S. 18, as clarified in *Harrington* v. *California,* 395 U.S. 250, a district court should be permitted to refuse to entertain a challenge to such evidence on collateral attack. In *Kaufman* v. *United States,* 394 U.S. 217, where there was an objection at trial although no pre-trial motion to suppress, the Court found, contrary to the government's position, that the challenged evidence did have a significant bearing on the defense of insanity. We do not read *Kaufman* as cutting back on the *Chapman* rule which the Court subsequently reaffirmed in *Harrington* v. *California, supra.* To confer upon a defendant the right to challenge the admissibility of evidence collaterally regardless of its significance at his trial would needlessly disrupt the orderly processes of justice. Defendants should be encouraged to challenge evidence before it is introduced; they should not be given an incentive to

attack in a proceeding under 28 U.S.C. 2255 an item of evidence the admission of which would not have required reversal had objection thereto been taken on direct appeal. As this Court recently stated in *Bryson* v. *United States,* No. 35, this Term, decided December 8, 1969, "a substantive defense which is not legally relevant on direct review becomes no more relevant because asserted on collateral review" (slip op., p. 9).[9]

II. THE RATIONALE OF *MARCHETTI-GROSSO* DOES NOT PRECLUDE THE ADMISSION INTO EVIDENCE OF WAGERING TAX FORMS IN A PROSECUTION FOR INCOME TAX EVASION

Even if this Court determines that petitioner's claim is cognizable under 28 U.S.C. 2255, the decision

[9] One further consideration might be mentioned at this point. In *United States* v. *Covington,* 395 U.S. 57, the Court explained that a claim of self-incrimination is a valid defense to a prosecution under 26 U.S.C. 4744 "unless the plea is untimely, the defendant confronted no substantial risk of self-incrimination, or the privilege has been waived." This formulation suggests that untimeliness is a factor separate and apart from deliberate "waiver" of a known right. A variety of factors indicate that petitioner's assertion of the privilege here should be regarded as untimely. The claim was raised for the first time years after the wagering tax forms had been filed; petitioner was not prosecuted for failing to comply with the wagering tax laws as were the defendants in *Marchetti* and *Grosso;* nor was he prosecuted for the illegal gambling activities which the returns declared, the type of disclosure which formed the basis of the *Marchetti-Grosso* holdings; he made no challenge to the admissibility of the forms on constitutional grounds at his trial for income tax evasion; and the forms would have been just as relevant to that proceeding if gambling had been a lawful activity. These factors were taken into account, it should be noted, by both of the lower courts in determining to reject petitioner's application for collateral relief (see A. 36–38, 49-50).

below should still be affirmed. There is, as we have shown (*supra*, pp. 18–20), no merit to petitioner's contention that this is a coerced confession case. Nor is there any basis for his claim, grounded on *Marchetti* v. *United States*, 390 U.S. 39, and *Grosso* v. *United States*, 390 U.S. 62, that the admission into evidence against him of the wagering tax forms, in his prosecution for income tax evasion, violated his privilege against self-incrimination.

In *Marchetti* and *Grosso* this Court held that a person charged with failure to register and pay the occupational or excise tax on wagering could assert, as a complete defense to prosecution for such non-compliance, that to comply would violate his privilege against self-incrimination. It did so because such a person is "confronted by a comprehensive system of federal and state prohibitions against wagering activities," and is "required, on pain of criminal prosecution, to provide information which he might reasonably suppose would be available to prosecuting authorities, and which would surely prove a significant 'link in a chain' of evidence tending to establish his guilt" (*Marchetti* v. *United States, supra*, 390 U.S. at 48). *Marchetti* and *Grosso* do not, however, support petitioner's belated assertion of the privilege in this collateral proceeding challenging his conviction for income tax evasion.

Under Treasury Regulation 44.6011(a)–1(a), those persons liable for the excise tax on wagers imposed by 26 U.S.C. 4401(a) must file wagering tax forms monthly. The form required to be filed in reporting each month's wagers—Form 730—must be filed by the

last day of the next succeeding month. Treasury Regulation 44.6071–1(a). Since the wagering tax forms filed for the months of any calendar year covered by the indictment were required to be filed well in advance of petitioner's income tax return for that year,[10] his obligation to file the forms created no "real and appreciable" hazard that he would incriminate himself for income tax evasion. *Regina* v. *Boyes,* 1 B. & S. [Q.B., 1861] 311, 330; *Brown* v. *Walker,* 161 U.S. 591, 599–600; *Rogers* v. *United States,* 340 U.S. 367, 374. These forms, showing gross receipts from gambling, could not of themselves have constituted an admission of any income tax offense. Nor did petitioner's disclosure of the fact that he was in the gambling business have the effect of incriminating him insofar as his income tax liability was concerned. It was only petitioner's *subsequent* acts of omitting substantial parts of his income from his income tax returns that made the *previously* filed wagering tax forms at all relevant to this prosecution. At the time the forms were filed, it could not be said that they "would surely prove a significant 'link in the chain' of evidence tending to establish his guilt" of the crime for which he has been convicted (*Marchetti* v. *United States, supra,* 390 U.S. at 48). Indeed, any such risk can only be described as "imaginary and insubstantial" (*Regina* v. *Boyes, supra; Brown* v. *Walker, supra; Rogers* v. *United States, supra;* cf. *Minor* v. *United States,* No. 189, this Term, decided December 8, 1969.

In *Marchetti* and *Grosso* the Court made it clear

[10] Under 26 U.S.C. 6072(a), petitioner's income tax return for each calendar year was due on the succeeding April 15.

that it was not holding that the imposition of the occupational and excise taxes on wagering was constitutionally prohibited, but only that the privilege provided a complete defense in a prosecution for failure to comply with the related filing and payment requirements of the statute. Thus, in *Marchetti* the Court carefully circumscribed its holding as follows (390 U.S. at 61):

> * * * we do not hold that these wagering tax provisions are as such constitutionally impermissible; we hold only that those who properly assert the constitutional privilege as to these provisions may not be criminally punished for failure to comply with these requirements. * * *

It similarly limited its holding in *Grosso,* in even more explicit language (390 U.S. at 69–70, n. 7).

Although the Court did not decide the question in *Marchetti* and *Grosso,* the introduction of wagering tax forms against a gambler in a prosecution for violation of a statute that is part of the "comprehensive system of federal and state prohibitions against wagering activities" (*Marchetti* v. *United States, supra,* 390 U.S. at 48) presumably would be barred by the privilege against self-incrimination. See *United States* v. *Lookretis,* 398 F. 2d 64 (C.A. 7). This result would seem to follow because such a statute is one of those that led the Court to conclude that the privilege could be asserted as a defense to the charge of failing to pay the occupational or excise tax on gambling, since otherwise incrimination thereunder would potentially result. But the federal income tax laws are not part of that com-

prehensive statutory system.[11] They are neutral on their face, insofar as the legality of a taxpayer's activities is concerned, and apply to all persons, not just a group inherently suspect of criminality. And the income tax is imposed—at the same rate—on income from all activities, whether they be lawful or unlawful. See *United States* v. *Sullivan,* 274 U.S. 259; *Albertson* v. *SACB,* 382 U.S. 70, 79. In light of these considerations, allowing the privilege to be asserted here would extend *Marchetti-Grosso* significantly beyond the premises upon which the holdings in those cases are based.

Even if the penumbra of *Marchetti-Grosso* extends beyond prosecutions for violation of the wagering tax laws themselves and State statutes comprising the comprehensive prohibitory system relating to gambling described by the Court in those cases, it surely does not cover a prosecution for wilfully filing false income tax returns. This much, we submit, is established by the Court's holding earlier this Term in *United States* v. *Knox,* No. 17, decided December 8, 1969. There the Court demonstrated that it meant precisely what it said in *Marchetti* and *Grosso*—that those decisions do not bar the use in all prosecutions of wagering tax forms filed before the date thereof. It upheld the indictment there, over a claim of privilege, for wilfully filing false wagering tax forms in violation of 18 U.S.C. 1001. Here, as in *Knox* but unlike

[11] In his opinion for the Court in *Marchetti*, Mr. Justice Harlan enumerated the types of gambling and gambling-related offenses with respect to which wagering tax forms could prove incriminatory (see 390 U.S. at 52–53).

in *Marchetti-Grosso,* wagering tax forms were in fact filed. The issue in *Knox* was whether *Marchetti-Grosso* excused falsification in filing those forms. The analogous question here is whether *Marchetti-Grosso* requires the exclusion of such forms from evidence in a prosecution for filing false income tax returns. The result in *Knox* argues strongly for a negative answer; indeed, the relevance of the privilege is even more attenuated here than in *Knox.*

If the privilege against self-incrimination is not an absolute defense in a prosecution for wilfully filing false wagering tax forms—which this Court subsequently held need not have been filed—*a fortiori* the privilege is no defense in a prosecution for wilfully filing false income tax returns which, of course, must be filed regardless of the illegal nature of the taxpayer's income-producing activities. *United States* v. *Sullivan, supra.* It is no answer to suggest, as petitioner does in reliance on *Knox* (slip op., p. 5), that the Fifth Amendment is offended here because he "succumbed to the statutory compulsion by furnishing the requested incriminatory information" (Pet. Br. 19). This argument is without merit because the information furnished by petitioner was not incriminatory as to the offense for which he was convicted. The forms he filed were not even relevant until he committed, at a later date, the distinct offense of income tax evasion—for which he was here charged, tried and convicted. In the circumstances of this case, then, petitioner's claim of the privilege is "extreme" and "extravagant" (*United States* v. *Sullivan, supra,* 274 U.S. at 263), and should be rejected.

III. THE RATIONALE OF *MARCHETTI-GROSSO* SHOULD NOT BE APPLIED RETROACTIVELY TO CONVICTIONS WHICH HAD BECOME FINAL PRIOR TO THE DATE OF THOSE DECISIONS

If the issue should be reached, it is our position that *Marchetti* and *Grosso* should be given prospective application only, at least in cases where the challenge to evidence based on those decisions is made only collaterally. This is particularly so, we submit, in cases such as this one, involving as it does a conviction for a violation wholly outside the wagering tax—and indeed gambling—context.

As this Court pointed out in the first case on the subject, "the Constitution neither prohibits nor requires [that] retrospective effect" be given to decisions fashioning new or changed rules (*Linkletter* v. *Walker,* 381 U.S. 618, 629). Over the past few years the criteria for determining retroactivity have been clarified in various of this Court's decisions, and were most recently enunciated in *Halliday* v. *United States,* 394 U.S. 831, 832. Those criteria are (1) the *purpose* of the newly fashioned rule; (2) the extent of *reliance* upon the prior rule; and (3) the *effect* that retroactive application would have upon the administration of justice. See also *Stovall* v. *Denno,* 388 U.S. 293, 297; *Desist* v. *United States,* 394 U.S. 244, 249. An overriding concern has been to ensure the fairness of the fact-finding or guilt-determining process (*ibid.*). Retroactivity has not been made dependent upon the value of the interest sought to be protected by the new rule, however,

and a right is not disparaged by the Court's determination not to give it retrospective application. *Johnson* v. *New Jersey*, 384 U.S. 719, 727–728.

It does not demean the importance of the privilege against self-incrimination to observe that its purpose does not relate to protecting the innocent from conviction, but rather to preserving "the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution 'shoulder the entire load' " (*Tehan* v. *Shott*, 382 U.S. 406, 415; *Miranda* v. *Arizona*, 384 U.S. 436, 460). In contrast to constitutional rules which have been given retrospective application because they touched upon the truth-determining process or involved procedural safeguards designed to ensure against convicting the innocent (*e.g.*, *Roberts* v. *Russell*, 392 U.S. 293; *Jackson* v. *Denno*, 378 U.S. 368; *Gideon* v. *Wainwright*, 372 U.S. 335), the Fifth Amendment privilege stands as a protection of quite different values—"values reflecting the concern of our society for the right of each individual to be let alone" (*Tehan* v. *Shott*, *supra*, 382 U.S. at 416).[12] While these latter values are indeed important, from the standpoint of determining retroactivity they do not furnish a basis for other than prospective application of constitutional decisions in the Fifth Amendment area. This is particularly so where, as here, the other evidence of guilt is ample and the truthfulness of the matters disclosed on the wagering tax forms was never questioned. In short, petitioner's concern is not the unreliability or untrustworthiness of

[12] See also *Arsenault* v. *Massachusetts*, 393 U.S. 5, 6 (footnote).

the statements made in the forms, but simply the threat of what else might have been revealed by admission of the statements in evidence.

Since the first criterion overwhelmingly favors non-retroactivity, the effect of the other factors need not undergo lengthy examination. See *Desist* v. *United States,* 394 U.S. 244, 251. But even if the purpose of the rule in question did not clearly militate against retrospective application, the factors of the extent of reliance and the consequent burden on the administration of justice provide additional support for a holding of non-retroactivity. The second criterion, the extent of reliance upon the prior standard, must take into consideration the fact that more than 15 years ago this Court concluded in *United States* v. *Kahriger,* 345 U.S. 22, that the Fifth Amendment privilege against self-incrimination did not constitute a defense to prosecutions based upon wilful failure to register and pay the special wagering occupational tax as required by 26 U.S.C. 4411 and 4412. That holding was reaffirmed two years later in *Lewis* v. *United States,* 348 U.S. 419. Although these decisions did not deal explicitly with the wagering excise tax, the Court recognized in *Grosso* v. *United States,* 390 U.S. 62, 70, that the self-incrimination questions presented by the separate taxes were related. There was thus no reason why law enforcement authorities should have doubted their right to use wagering tax forms filed without protest or made any attempt to relitigate the consti-

tutionality of the statute, particularly in a prosecution for income tax evasion.

The third criterion, the effect of retroactive application of the new standard upon the administration of justice, also argues against applying *Marchetti* and *Grosso* retroactively. It is true that relatively few individuals now serving prison sentences have been convicted of wagering tax offenses, since the average prison sentence for such violations has been about one year, and prosecutions have virtually halted since January 29, 1968—the date *Marchetti* and *Grosso* were decided. See *United States* v. *Lucia*, 416 F. 2d 920, 925 (C.A. 5). However, the completion of a sentence does not necessarily render moot an attack upon a conviction. *E.g.*, *Carafas* v. *LaVallee*, 391 U.S. 234, 237–238; *Sibron* v. *New York*, 392 U.S. 40, 55–58. Prior to 1968, there was a sizable number of individuals, at least in the thousands, who had purchased wagering tax stamps,[13] and there were numerous prosecutions for failing to file wagering tax forms. There is little doubt that the courts would

[13] The annual reports of the Commissioner of Internal Revenue list the following number of wagering occupational tax stamps issued for the following fiscal years ended June 30:

Year	Number of stamps
1963	7,450
1964	7,465
1965	7,284
1966	6,155
1967	5,917
1968	5,089
1969	3,527

be compelled to entertain a substantial number of collateral motions to vacate sentences imposed on convictions for violating the wagering tax laws if *Marchetti-Grosso* were accorded wholly retroactive application. *Graham* v. *United States,* 407 F. 2d 1313 (C.A. 6), petition for certiorari pending, No. 294 Misc., this Term.

Moreover, there is no available record of how many gamblers like petitioner were convicted of income tax evasion in trials where forms filed by them pursuant to the federal wagering tax laws were introduced, nor of the sentences such individuals received. In all likelihood, a significant number of such persons exist, since gamblers have historically been deemed a suspicious class, capable of concealing revenue with relative ease because of the nature of their activities. See *United States* v. *Costello,* 221 F. 2d 668, 672 (C.A. 2) (L. Hand, J.), affirmed on other grounds, 350 U.S. 359. Retroactive application of *Marchetti-Grosso* would require individual consideration of each claim, and in instances where the accused had not asserted the privilege at trial, a hearing to determine whether there had been an intelligent waiver. See *Masterson* v. *United States,* 293 F. Supp. 787 (D. Del.). The error complained of, particularly in the context of this case, is not so fundamental that it should be allowed, at this late date, to disrupt the ongoing administration of our criminal laws and require the upsetting of all final convictions based upon it.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be affirmed.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

FRANCIS X. BEYTAGH, JR.,
MATTHEW J. ZINN,
Assistants to the Solicitor General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

FEBRUARY 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970

FILE COPY

MAR 30 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. ~~580~~ 36

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

REPLY FOR PETITIONER FRED T. MACKEY

WILLIAM M. WARD
39 S. LaSalle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner,
Fred T. Mackey

MIDWEST LAW PRINTING CO., CHICAGO 60601, FINANCIAL 6-3988

INDEX

PAGE

I.

The Wagering Tax Forms Were Admittedly Relevant And Of Great Significance In Proving Petitioner's Guilt; They Were An Important And Relevant Link In The Chain Of Evidence Needed To Prosecute, And Their Admission In Evidence At Trial Rendered Petitioner's Trial Inquisitorial Rather Than Accusatorial; Therefore, Petitioner's Prayer For A New Trial On Constitutional Grounds Is Properly Cognizable And Should Be Granted Under 28 U.S.C. 2255 1

A. The fact that coerced evidence or its fruits was admitted in the criminal trial should automatically require a new trial free of such evidence or its fruits 1

B. As a matter of fact, the wagering tax returns and summary exhibit (Exhibit 765) were relevant and significant to the government's case, and their use at the trial was not harmless error 8

II.

The Rationale Of Marchetti And Grosso Does Preclude The Admission Into Evidence Of Wagering Tax Returns Or Their Fruits In Any Criminal Prosecution 19

III.

Marchetti-Grosso Should Be Retroactively Applied 23

Conclusion 26

List Of Authorities Cited

Cases:

Byers v. Justice Court, ... Cal. 2d ....., 80 Cal. Rptr. 553, 458 P. 2d 465 (1969), Petition for writ of certiorari filed sub nom California v. Byers, January 13, 1970, No. 1070 ..... 6, 21, 24

Chapman v. California, 386 U.S. 18 ..... 2, 3

Echikovitz v. United States, 1 Cir., 25 F. 2d 864 10

Elkanich v. United States, Oct. Term, 1969, No. 1142 ..... 8, 25

Harrington v. California, 395 U.S. 250 ..... 2, 3

Holland v. United States, 348 U.S. 121 ..... 2, 9, 11

Kaufman v. United States, 394 U.S. 217 3

Linkletter v. Walker, 381 U.S. 618 25

Malloy v. Hogan, 378 U.S. 1 5

Marchetti v. United States, 390 U.S. 39 20

Massei v. United States, 1 Cir. 241 F. 2d 895 (1957) 10, 11

Miranda v. Arizona, 348 U.S. 436 5

Murphy v. Waterfront Commissioners, 378 U.S. 52 ..... 5, 20

United States v. Accardo, 298 F. 2d 133 (1962) 9

United States v. Dressler, 7 Cir., 112 F. 2d 972 10

United States v. Feldten, No. 87, February 24, 1970, 38 LW 4153 21

United States v. Johnson, 319 U.S. 503 11

United States v. Lucia, 5 Cir., 416 F. 2d 290 (1969) 7, 24

Zicarelli v. New Jersey State Commission, 55 N.J. 249, 261 A. 2d 129 (1970) 21

Treatises:

Levy, Origins of the Fifth Amendment, (Oxford Univ. Press, 1968), pp. vii-viii 5

McCormick, Evidence, para. 157, p. 327 (1954 ed.) .. 10

Wharton, Criminal Evidence, Vol. 1, para. 344, pp. 486-7 (11th ed., 1935) 10

In The

Supreme Court of the United States

October Term, 1969

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

REPLY FOR PETITIONER FRED T. MACKEY

I.

THE WAGERING TAX FORMS WERE ADMITTEDLY RELEVANT AND OF GREAT SIGNIFICANCE IN PROVING PETITIONER'S GUILT; THEY WERE AN IMPORTANT AND RELEVANT LINK IN THE CHAIN OF EVIDENCE NEEDED TO PROSECUTE, AND THEIR ADMISSION IN EVIDENCE AT TRIAL RENDERED PETITIONER'S TRIAL INQUISITORIAL RATHER THAN ACCUSATORIAL; THEREFORE, PETITIONER'S PRAYER FOR A NEW TRIAL ON CONSTITUTIONAL GROUNDS IS PROPERLY COGNIZABLE AND SHOULD BE GRANTED UNDER 28 U.S.C. 2255.

A. The fact that coerced evidence or its fruits was admitted in the criminal trial should automatically require a new trial free of such evidence or its fruits.

The government's brief on Point I of their Argument is not a model of clarity. We understand its argument

to be that the use of the wagering tax returns in the criminal trial was harmless error under the rule of *Chapman* v. *California,* 386 U.S. 18. *Chapman* requires the government to show beyond a reasonable doubt that constitutional error was so unimportant and insignificant that it made no contribution to a conviction. *Harrington* v. *California,* 395 U.S. 250 reaffirms and further applies *Chapman* and holds that in a criminal case not woven from circumstantial evidence[1], a departure from constitutional procedures could be considered harmless beyond a reasonable doubt where the evidence of guilt is "overwhelming".

At least on this point in its argument, the government concedes constitutional error at Petitioner's trial. But the government then seemingly argues that because Petitioner did not raise the issue of self incrimination at trial (which was an issue foreclosed to him because of the then viable *Kahriger* and *Lewis* decisions; Petitioner's Brief, 30-32), he now must in these Section 2255 proceedings assume the burden of affirmatively showing that the challenged evidence played a "significant" part in bringing about his conviction (Brief, 20). Thus, if we read the government's argument rightly, and we are not sure we do, the burden apparently should now be upon the Petitioner to show for the first time in this Court that

---

[1] It is important to note here, although this point will be brought up again in this Reply, that the net worth tax evasion case against Petitioner was entirely woven from circumstantial evidence. It is a unique type of criminal case which is "something more than the ordinary use of circumstantial evidence in the usual criminal case"; *Holland* v. *United States,* 348 U.S. 121, 124.

the wagering tax returns and the summary exhibit based thereon (ex. 765) played a significant part in his conviction, after the District Court and the Court of Appeals on four separate occasions have reviewed the record in this case. This we can and will do later in this Reply; see p. 8, *infra*. But we question the propriety of the government's request to this Court to review the criminal trial record, in light of the fact that the District Court has reviewed the evidentiary impact of these exhibits and deemed Petitioner's constitutional attack as such a "new and serious question" (App. 28), that it did not require an answer by the government to the petition for relief under Section 2255. Nor did the government seek to file an answer in the District Court in these 2255 proceedings in which it could have raised the affirmative defense of *Chapman*, or any other affirmative defense that it now raises for the first time in this Court.

We do not believe it is important or necessary to criminal justice, or a decision in the case at bar, for this Court to provide new guidelines for the lower federal courts concerning the application of *Kaufman* v. *United States*, 394 U.S. 217. These guidelines are in existence. In *Kaufman*, this Court held that constitutional error at trial could be collaterally attacked in a 2255 proceedings. In *Chapman* and again in *Harrington*, this Court laid down the guidelines for such an attack; i.e. the burden is on the government to show beyond a reasonable doubt that constitutional error at trial was unimportant, insignificant and harmless. This burden is no more or less than the "beyond a reasonable doubt" burden that the government always shoulders in a criminal trial. Furthermore, we question whether the rule in *Kaufman* is properly before this Court in this cause. The Court of

Appeals below found it controlling in the case at bar against the contention by the government that it was not (App. 49), and the government has filed no cross-petition for a writ of certiorari in this Court to question that ruling.

Moreover, and most important, we earnesly urge this Court to reaffirm what we believe is the settled rule that the use at trial of evidence, or the fruits of evidence, coerced from a defendant in violation of the privilege against self incrimination can never be harmless error, either under *Chapman* or any new standard of "significance" urged upon this Court by the government. Such a rule was obviously presumed by the Courts below and is implicit in their opinions. This rule would reaffirm the essential nature of the prvilege, that is, it protects a person against an inquisitorial trial, or a trial in which evidence is admitted which was procured in an inquisitorial proceeding, by affirmatively protecting the person's right to an accusatorial trial.

The essential fallacy of the first paragraph of the government's argument is that it assumes or presumes that the thrust of Petitioner's attack upon his conviction is that certain evidence was wrongfully admitted against him at trial. This is most certainly wrong. Evidence was wrongfully admitted at the criminal trial, but we do not raise this as an evidentiary question. The privilege against self incrimination is not a rule of evidence; it arises out of our history as British subjects and American citizens. At its broadest, the privilege does represent and protect a "complex of values" such as the right to be left alone, the abhorrence of torture, a recognition that coerced confessions are not reliable, and other values;

Murphy v. *Waterfront Commissioners,* 378 U.S. 52, 55; *Miranda* v. *Arizona,* 348 U.S. 436; and see Levy, *Origins of the Fifth Amendment,* (Oxford Univ. Press, 1968), pp. vii-viii. These are some of its social and political antecedents in history. But this Court has further defined its essential rock-bottom meaning to our legal system as a "recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay;" *Malloy* v. *Hogan,* 378 U.S. 1, 7. Thus, "[g]overnments, state and federal, are . . . constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth"; *Malloy,* 378 U.S. at p. 8; *Miranda* v. *Arizona,* 348 U.S. 436, 460.

It is these decisions of this Court that provide the predicate for Petitioner's attack upon his conviction. He has a right established in about 1700 and now protected by the Fifth Amendment to a trial fully accusatorial in nature. Petitioner never received an accusatorial trial, because his trial in relevant and significant part was inquisitorial in nature.

The government's argument in this case is a massive assault upon the privilege against self incrimination. There is no case that we can find, or the government can cite, which holds that the privilege against self-incrimination can be violated or even violated a little bit, and the fruits of this violation then used against the defendant in a criminal trial. This is the impact of what the government urges this Court to hold. Thus, as the government apparently argues, a statement can be coerced from a defendant that he owned a murder weapon, and

this statement can be admitted against him if evidence of his guilt is "overwhelming". And, as the government further argues, if that defendant's counsel fails to object to this clear violation of his rights, then the defendant must subsequently show that the use of his coerced statement was "significant" to his conviction. Or, and more subtly, reports can be coerced by legislation from persons under the fear of punishment for the purpose of providing evidence or leads to evidence for prosecution. These reports may then be used against the person if the prosecutor believes the other evidence will be overwhelming, or if he hopes the privilege will not be raised so that the defendant will later need to show "significance." We doubt if there is a prosecutor who does not believe his evidence is "overwhelming" and if it is not, well why not take the chance.

The Supreme Court of California has very recently specifically rejected an argument almost identical to the one made by the government in the case at bar; *Byers* v. *Justice Court,* ..... Cal. 2d ....., 80 Cal. Rptr. 553, 459 P. 2d 465 (1969); Petition for writ of certiorari filed *sub nom California* v. *Byers,* Jan. 13, 1970, No. 1070. There, that Court specifically held in reliance upon the decisions of this Court that absenting immunity granted, the State by statute could not compel written reports and disclosures from a person involved in an auto accident. The Court held in words which utterly demolish the argument made by the government in the case at bar, and in theory which we urge should cause this Court to examine whether the "harmless error" doctrine can be applied to self-incrimination cases, as follows (80 Cal. Rptr. at p. 559):

"It does not matter, as the People appear to contend, that in some 'hit-and-run' situations prosecuting authorities may be able to establish the driver's identity beyond a reasonable doubt from other evidence such as eyewitness identification of the driver, his vehicle, or its license plate. '[T]he basic purposes that lie behind the privilege against self-incrimination * * * relate * * * to preserving the integrity of a judicial system in which even the guilty are not to be convicted unless the prosecution "shoulder the entire load."' (*Tehan* v. *U. S. ex rel. Shott*, 382 U.S. 406, 415, 86 S. Ct. 459, 464, 15 L. Ed. 2d 453) 'Government, state and federal, are * * * constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth.' (*Id.* at p. 414, 86 S. Ct. at p. 464.)"[2]

That is what the case at bar is all about; i.e., will the privilege against self incrimination and its purposes be upheld by this Court as an absolute defense to the use of coerced evidence or its fruits in a criminal trial; and will Petitioner be afforded a fully accusatorial trial?

Finally, if this Court should hold that the harmless error rule is applicable to criminal trials in which coerced evidence or its fruits is admitted, we see no cogent or

---

[2] Compare *United States* v. *Lucia*, 5 Cir., 416 F. 2d 920 (1969).

sensible reason for further dilution of the *Kaufman-Chapman* rules in retroactivity cases such as the case at bar. Why should the burden of showing significant constitutional error now shift to the Petitioner simply because he now makes a claim of constitutional error not available to him at trial because of this court's prior decisions since overruled? We join with Petitioner in *Elkanich* v. *United States,* No. 1142, now pending in this Court, in earnestly arguing to this Court that a vindication of a person's federal constitutional rights should not be impeded by further fine drawn distinctions spun around the words "collateral" or "direct" review. Either a defendant was convicted in derogation of his constitutional rights or he was not. Either the harmless error rule of *Chapman* applies to the attack on the conviction or it does not. We do not believe it applies to a conviction obtained through the use of coerced statements or their fruits. If the *Chapman* rule does apply, either this constitutional error was harmless beyond a reasonable doubt, or it was not. These general principles are ones easily understood and applied by the Courts, lawyers, and most important, the people who are protected by these rights.

B. As a matter of fact, the wagering tax returns and summary exhibit (Exhibit 765) were relevant and significant to the government's case, and their use at the trial was not harmless error.

Assuming that the *Chapman* rule does apply to the case at bar, and regardless of who has the burden of proof on this issue, the use of the wagering tax returns and ex. 765 at trial was not harmless error within its terms, be-

cause this evidence was relevant, significant and vitally important to the government's case. The argument of the government in this Court that the wagering tax returns were not significant, and their use might have been foregone had Petitioner raised a constitutional objection which he did not have at trial, is belied by the record at trial. In connection with a review of the relevant record, it must be kept in mind that Petitioner's net worth trial was purely a circumstantial case, there was no evidence of specific items of unreported income, and a net worth case is something more than the usual circumstantial criminal case; *Holland* v. *United States,* 348 U.S. 121, 124.

I. We think it specious for the government to argue now, and for the first time, that had Petitioner raised an objection because of the privilege at trial, the government would have decided not to use the wagering tax returns. The viable *Kahriger-Lewis* cases held that Petitioner had no privilege to raise, and would have provided ample ground for overruling any such objection. But the government faced a more serious and significant threat to the integrity of its trial because of the use of these returns than a useless Fifth Amendment objection by Petitioner. And it faced this threat with equanimity because it intended to and succeeded in establishing in the trial court that these returns were relevant and important to its case.

In *United States* v. *Accardo,* 298 F. 2d 133 (1962), the Court of Appeals for the 7th Circuit had specifically held that the admission of tax returns against a defendant in a criminal tax case which characterized him as a gambler where such returns were irrelevant to the gov-

ernment's case was prejudicial and reversible error.[3] This is why Petitioner's counsel objected to these returns as prejudicial in the trial. The District Court was aware of this decision (e.g. A.A. 1382-1385, 1846); and this is why, as the government points out (Brief 7-10), the District Court below denied admission on two occasions to the wagering tax returns until the government could make some showing that the information contained in the returns as summarized on ex. 765 was not included in the Schedule C forms to Petitioner's income tax returns (exs. 1-13).

But the government now belatedly argues in this Court that the Schedule C forms contained the words "policy" or "policy wheel", thus the wagering tax returns were superfluous and "not significant" to their admitted use as a likely source of unreported income. This argument again is belied in the record of the trial and by the government's own admissions.

First, we doubt that the words "policy" or the one use of the word "policy wheel" as used in Petitioner's *income* tax returns within the context of a case replete with testimony about and exhibits concerning insurance companies, their policies or their policy income, were sufficient to characterize Petitioner as a gambler. In fact, the prosecutor never argued to the Jury that these *income* tax returns showed that Petitioner was a gambler and had a likely source of unreported income from gambling.

---

[3] There is a line of authority in accord; e.g., *Massei* v. *United States*, 1 Cir., 241 F. 2d 895; *United States* v. *Dressler*, 7 Cir., 112 F. 2d 972; *Echikovitz* v. *United States*, 1 Cir., 25 F. 2d 864; McCormick, *Evidence*, para. 157, p. 327 (1954 ed.); Wharton, *Criminal Evidence*, Vol. 1, para. 344, pp. 486-7 (11th ed., 1935).

Secondly, and most important, and as the government ell knows, likely source of unreported income is proved n net worth cases in one of two ways. Where the tax- ayer declared ownership of a business it is considered ufficient proof of likely source for the government to stablish that the *disclosed* business was capable of pro- ucing much more income than was reported; where ne taxpayer is the owner of an *undisclosed* business, roof that the *undisclosed* business was capable of pro- ucing income is considered sufficient; *Massei* v. *United tates*, 1 Cir. 241 F. 2d 895, 901 (1957); and see *Hol- nd* v. *United States*, 348 U.S. 121, 138; *United States Johnson*, 319 U.S. 503.

Thus, if "policy" in Petitioner's income tax returns as considered as a *disclosed* gambling business or source rom which income was obviously reported in these in- ome tax returns, the government at trial had to show at this *disclosed* business or source was capable of roducing much more income than was reported. Or, if policy" as reported in the income tax returns was too ebulous a term within the context of the case upon hich the government could fairly argue that gambling as a *disclosed* source of income which was capable of roducing much more income than was reported, then the agering tax returns were relevant and significant to ow that Petitioner had an *undisclosed* gambling source unreported taxable income. The government had it ther way in the use of the wagering tax returns.

There is no mystery or speculation concerning the rele- nce or importance of these exhibits to the government. represented to the District Court below in the crim- al trial that they were necessary to show a source of

unreported income (A.A. 229-231; 1382-1385); witness Harrington and his exhibit 765 were specifically put on and the exhibit admitted to show that the wagering tax returns disclosed more income from gambling than was reported in Petitioner's income tax returns. This is specifically stated by the government in its Brief in this Court (8-10). In addition to that admission made in this Court, the clearest exposition of the necessity and importance of the wagering tax returns to the government in the criminal trial is found in an admission made in its Brief in the Court of Appeals in the criminal appeal. There, it specifically pointed out, in order to escape the effect of *Accardo,* that the wagering tax returns were relevant and necessary to show Petitioner was a gambler, and were further necessary to show he had a bigger income from that source than his income tax returns showed, as follows (Brief for Appellee in No. 14584 in the Court of Appeals, pp. 42-43)(*):

> "(2) Here the likely source of appellant's huge net worth increases with his policy wheel operation. (Govt. Exs. 9-13, Sched. C; 765.) Judge Learned Hand, speaking for the Second Circuit in *United States* v. *Costello,* 221 F. 2d 668, 671-672 (C.A. 2d), affirmed, 350 U.S. 359, stated, 'There was no difficulty in the case at bar in pointing to such a source [of unreported taxable income]. By his own admission Costello was a gambler * * * an occupation with

(*) That Brief was filed with the four volume Appellant's Appendix and Appellant's Brief in this Court as part of the record in the case at bar.

indeterminate possibilities * * *.' We submit that if a gambler may make an 'indeterminate' amount of money, *a fortiori* a policy wheel operator may.[22]"

* * * * *

"It follows from what has been said that the admission into evidence of the wagering tax returns was not 'prejudicial error' (Br. 72), for they constituted a part of the Government's case on the important issue of a likely source of unreported taxable income. *United States* v. *Chapman*, 168 F. 2d 997, 1001 (C.A. 7th), certiorari denied, 335 U.S. 853.[23]"

"[22] There was no direct proof that any of appellant's unreported income arose from his activities as a numbers banker. (Indeed, if there had been the Government would have had no need to use the cumbersome net worth method.) But direct evidence is, of course, not required. *United States* v. *Johnson*, 319 U.S. 503, 517; *Holland* v. *United States*, *supra*, p. 138."

"[23] Although appellant's income tax returns indicated that he was in the policy wheel business (Govt. Exs. 9-13, Sched. C) the ostensible scope of that operation was drastically modified by his reporting a net figure ('ins' minus 'payouts') as 'Total Receipts' on those forms. Government's Ex. 765—based on the wagering tax returns, Form 730—showed that in fact it was a much larger operation. (A.A. 1364-1373.) This is not to say, of course, that the Government claimed or implied that there was any direct proof of unreported net income from the policy wheel operation, but only that the wagering tax returns proved that it was a bigger business—and hence a more likely source of unreported income—than the income tax returns indicated."

Thus, and until it filed its Brief in this Court, the government has never deviated from its prior argument consistently maintained that these wagering tax returns were relevant and important to its case in order to escape the consequences of *Accardo*. Had this argument gone against the government either in the trial court or the Court of Appeals in the criminal case, Petitioner would have been entitled to a new trial under the authority of *Accardo*. In these 2255 proceedings, the government never questioned the relevancy or significance of these returns in the Courts below, and, as has been previously noted, both Courts below rightly assumed they were significant. The Government now, and for the first time, puts itself in the anomalous position of stating that these wagering tax returns could have been easily omitted from its case; therefore, and inexorably, implying that their use served no other significant purpose than to prejudice the minds of the jurors with the irrelevant fact that Petitioner was a gambler in direct violation of the decision in *Accardo*.

In any event, whether these wagering tax returns were introduced and admitted for the avowed and necessary purpose of either showing an undisclosed source of unreported income or that a disclosed source of income did produce a greater income than was reported, or, for the unavowed purposes of prejudicing the jurors with the irrelevant and prejudicial fact that Petitioner was a gambler, *they were obtained from and used against Petitioner in violation of his privilege against self-incrimination*. That is the fact which is dispositive of the case at bar.

II. The record of the criminal trial further belies the government's contention in this Court that the wagering tax returns were not significant to its case. The criminal trial was a long trial, and, as in all net worth cases, numerous witnesses testified and many documents were tediously admitted primarily to lay the foundation for the testimony of the government's summary technical witnesses and for the admission of their summary exhibits. These witnesses and exhibits purport to summarize what the raw mass of evidence is supposed to mean; e.g., see the testimony of Kallimani, 1342 et seq., and the testimony of Harrington, 1363 et seq. In fact, as the government pointed out, there were over 800 exhibits consisting of approximately 1,025 separate pieces of paper admitted at the trial. (A.A. 1858)

The question inevitably arises, which of these pieces of paper did the prosecutor consider important enough and relevant enough at the trial to isolate from the mass of exhibits and specifically point out to the jury? Obviously, the government's summary exhibits which purported to sum up the foundation evidence in its favor were mentioned the most. The government's final summary exhibit (ex. 800, A.A. 2102 et seq.) was mentioned six times by the prosecutor in his final argument (A.A. 1864-1865-1869-1871-1926). Exhibit 8, another summary of net worth and personal expenditures was mentioned once (A.A. 1865). Exhibit 196, another summary sheet of payments, was mentioned once (A.A. 1867-68). Exhibit 899, another summary exhibit, was mentioned twice (A.A. 1919 and 1926). Exhibit 102, a Board of Directors minutes of meeting was mentioned once (A.A. 1872). Exhibit 482 a summary of premium income and exhibit 483 which were corporate deposit slips of one of the insurance companies were mentioned once each (A.A. 1916).

And the Jury was "invited" to look at the wagering tax returns and/or ex. 765 summarizing these returns on *four* separaae occasions. These "invitations" were as follows:

A.A. 1875: "Mrs. Fannye Benford would suggest to you, ladies and gentlemen, Mr. Fred Mackey never went near those three safes. Mrs. Fannye Benford would have you believe, ladies and gentlemen, that Mr. Fred Mackey never had $50,000. The very testimony 'He don't have that kind of money. He didn't have that kind of money.'

"May I suggest, ladies and gentlemen, in your examination of the evidence in this case and particularly the documentary evidence, that you take a look at Government's Exhibits 51 through 89, and may I suggest in connection with that, to expedite your examination, Government's Exhibits 765, another one of Mr. Harrington's now famous charts. His Honor will instruct you on what use these may be to you. They are not evidence. They are merely to aid you and assist you so you do not have to get your papers and pencils out and do your computations. But look at Government's Exhibit 765, and you determine on the basis of varied documents prepared at the direction of the defendant by Miss Laura McComb from books and records and information given her by the defendant, whether Mr. Fred Mackey ever had $50,000.00."

A.A. 1920: "I talked about Government Exhibit 765 this morning, Mr. Downing talked about it this afternoon, and I am talking about it again. What is Government Exhibit 765?

"It is no more or less than totaling figures from Government Exhibits 30 through 89, the so-called 730 returns, the so-called wager tax returns, the so-called, as Mr. Downing refers to them, policy returns —policy, to be sharply distinguished from the policy

written by Gibraltar Insurance Company, or Gibraltar Mutual Life Insurance Company.

"Those returns, if you recall the testimony of Miss Laura McComb, were prepared by her, at least from 1958 on, and they were prepared by her from information given to her by none other than this defendant, Fred Mackey. There is where the information came from.

"Oh, it is true, that Mr. Smith talked about the 'ins', and the 'outs', but who was the only person that really knows whether all of the 'ins' are in, and who is the only person who really knows whether all of the 'outs' were really paid out? Not Frank Smith, not Laura McComb, not Mr. Kallimani, not Mr. Harrington, not Mr. Blackwell. There sits the only man who knows whether those forms were correct. Nobody in the government knows that.

"Mr. Downing wants a likely source for the increases in net worth. I respectfully suggest that Government Exhibit 765 is a most likely source."

A.A. 1923: "How stupid can he be, is the question? Or how crafty was he trying to be? What was he trying to conceal? What was he trying to hide?

"I respectfully suggest to you that he was really trying to hide the true amount of what the 'ins' should have really been on Government Exhibits 39 through 80, and he was really trying to hide that the 'outs' were not as much as he would like you to believe. That is what I would suggest he was trying to do."

A.A. 1928: "But does Mr. Downing overlook Government Exhibits 30 to 89? Does he overlook what really Exhibit 765 is? It is merely a summary of tax returns, and if all of the 'outs' were paid out, and all of the 'ins' reflected are the only 'ins', those tax returns are in good shape. But there is only one man who can answer that question. That man

is not Frank Smith; that man is not Mr. Harrington."

The government now and belatedly argues here that these returns were not significant, yet except for its summary exhibit No. 800, no other of the mass of exhibits was isolated and pointed out to the jury as many times as these wagering tax returns and ex. 765. And, of equal significance, the government *never* "invited" the jury to look at the Schedule C Forms on Petitioner's income tax returns (exs. 9-13) for the purposes it invited the jury on four separate occasions to look at the wagering tax returns. Again, we need not speculate on the relevance or significance placed by the government on the wagering tax returns at trial, in order to admittedly show the Jury that Petitioner was a gambler and had a likely source of greater income than he reported in his income tax returns as income from "policy". It is in the trial record in the prosecutor's own words and actions while on trial.

III. In its statement (Brief 2-8), the government states certain computations and figures as specifically and easily proved facts presumably in evidence. These were not facts introduced in the criminal case but opinions and conclusions of the government's experts. For one of these figures, i.e. that Petitioner acquired more than $1,000,000 in new assets (Brief 3-4), there is no citation to the record because there is none. This was a contention of the government, not a fact in evidence. Petitioner did indeed argue that assets imputed to him in fact belonged to The Gibraltar Insurance Companies and the investment company simply because these assets were held by these companies in their names as the govern-

ment's evidence showed. The government further states that these companies had certain losses and certain gross income but we cannot find support for the figures stated in the citations to the record to support these statements.

Petitioner rested at the close of the government's case and moved for acquittal (A.A. 1843 et seq.). The record again belies the government's argument and statement in this Court that the evidence and case against Petitioner was overwhelming. If its unrebutted case were overwhelming, then why did the Jury require deliberation of approximately 43 hours over a period of five days? (A.A. 1970-1978). Any jury deliberates for such a period of time simply because the prosecution's case is thin and weak. We believe it can be fairly inferred that the wagering tax returns which the prosecutor invited the Jury to look at four times in final argument, was the conclusive and decisive evidence that terminated the deliberations of a Jury obviously not very convinced by the government's case.

II.

THE RATIONALE OF MARCHETTI AND GROSSO DOES PRECLUDE THE ADMISSION INTO EVIDENCE OF WAGERING TAX RETURNS OR THEIR FRUITS IN ANY CRIMINAL PROSECUTION.

Marchetti-Grosso squarely held that the wagering tax statutes coerced evidence and information from gamblers in order to provide evidence or leads to evidence to the government in order to prosecute gamblers. No immunity from the use of this evidence or its fruits were given to gamblers in the wagering tax statutes, and this Court specifically refused in *Marchetti-Grosso* to grant immunity principally because this Court found it was the

specific intent of those statutes, as expressed therein, that the information be afforded to prosecuting authorities; *Marchetti,* 390 U.S. 39, 58-59. And as noted in Petitioner's Brief in chief (16), it was specifically admitted by the I.R.S. that information collected from gamblers under the wagering tax statutes was used to prosecute gamblers on charges of evasion of both income and wagering taxes.

The government now argues that the use of coerced statements, or at least the use of coerced statements within the *Marchetti-Grosso* decisions, should be examined on a "transactional" basis rather than on a "testimonial" basis. That is, it argues that the coerced statements or its fruits cannot be used in a specific gambling prosecution, but they may be used in another prosecution even if that other prosecution involves gambling and its income as a related and integral part of that other prosecution.

This Court has laid to rest any argument concerning whether the privilege against self-incrimination is a transactional or a testimonial privilege by clearly holding that its protection is testimonial. That is, if the privilege is violated, or if testimony be compelled upon immunity granted, the witness may be prosecuted for a crime about which the testimony relates, but the compelled testimony and its fruits cannot be used "*in any manner* by federal officials" in connection with a criminal prosecution against the witness: *Murphy* v. *Waterfront Commission,* 378 U.S. 52 at p. 79.

Or, to put it in another way, coerced statements even if not necessary to the proof of the government's case in the criminal prosecution, fall within the privilege's

protection if they at least provided evidence or leads useful to the government; cf. *United States* v. *Feldten*, No. 87, February 24, 1970, 38 LW 4153, 4154.

Two State Supreme Courts have recently held in reliance upon this Court's decisions that the privilege is testimonial and thus protects against the use of the coerced evidence or its fruits *in any manner* unless full and complete immunity from its use is fully granted; see *Zicarelli* v. *New Jersey State Commission*, 55 N.J. 249, 261 A. 2d 129 (1970); *Byers* v. *Justice Court*, ... Cal. 2d ....., 80 Cal. Rptr. 553, 458 P. 2d 465 (1969), Petition for a writ of certionari filed *sub nom California* v. *Byers*, January 13, 1970, No. 1070.

Thus, Petitioner is protected by the privilege against the use of a coerced statement *in any manner* in a criminal prosecution. If this Court could not read immunity into the wagering tax statutes because of their expressed intent that prosecuting authorities have full use of the coerced statements in prosecuting gamblers; then *a fortiori* the full use of these coerced statements by federal prosecuting authorities against Petitioner in a criminal prosecution related to gambling most certainly violated the privilege.

The government's further argument that Petitioner was not factually incriminating himself when he was filing the coerced returns is absurd (Brief 23-25). This is not a specific item evasion case where a taxpayer suddenly decides on April 15th that he is not going to include certain items of income in his return. The indictment years were for 1955 thru 1960 inclusive. The wagering tax returns were filed for each month during those years. The theory of the government's case in

the criminal trial was that a) Petitioner was a gambl
that b) during the taxable year he had income fr
gambling allegedly in excess of that reported in his w
gering tax returns, that c) while he was allegedly hidi
this excess by filing wagering tax returns which alleged
did not include all of his gambling receipts, he was al
allegedly hiding his gambling income by purchasing a
sets in the names of regulated insurance companies a
investment companies which he controlled, and d)
allegedly finalized this scheme by allegedly filing a fal
income tax return which continued to understate h
previously concealed and hidden income from gambling.
Thus, under the government's theory of the criminal cas
if Petitioner was engaging in this scheme to wilfully u
derpay his income tax, he would be engaging in it a
year long, and an integral and prior part of the schem
would be the filing of the wagering tax returns whi
were presumably false.[6] In other words, he would ha
to file the coerced wagering tax returns and understa
his gambling income thereon each month during the ye
before he filed his income tax return which allegedly al
understated his gambling income for that year. Th
was the government's theory of the case which it no
seemingly professes to reject in this Court.

---

[5] Thus, part of the government's theory in the criminal tri
was that Petitioner was concealing unreported gambling income
purchasing assets in the names of regulated insurance compani
and investment companies. Under its theory of the case now f
the first time advanced in this Court, evidence to support su
allegations was also insignificant, not important and presumab
irrelevant, because these alleged purchases were made prior to t
filing of Petitioner's income tax returns each year.

[6] Petitioner has never been indicted for filing false wageri
tax returns.

Therefore, and within the government's theory of the criminal case at trial, every time Petitioner filed a wagering tax return he was providing, and did in the event provide, a significant link in the chain of evidence needed to prosecute and convict of a crime which he was alleged to be continually committing during the indictment years. Indeed, any risk of self-incrimination could only be described as "imaginary and unsubstantial" if the wagering tax returns were in fact true, and if the Schedule C forms reporting income from gambling were also true after taking into account the "ins" and "outs" not reflected in the wagering tax returns. Then, and in that event, Petitioner is and was not guilty of the crime charged, and was found guilty by a Jury which deliberated five days, and whose ears rang with the continued "invitation" of the prosecutor to remember he was a gambler.

III.

MARCHETTI-GROSSO SHOULD BE RETROACTIVELY APPLIED.

There is a certain air of unreality surrounding the government's brief on the retroactivity question.

First, it totally ignores the statements and decisions of this Court that convictions tainted by coerced statements must be set aside and a new trial ordered (Petitioner's Brief, 26-30). Second, it inferentially presumes (Government's Brief, 28-29) that whether a new trial should be granted under such circumstances revolves around whether the coerced statement admitted was truthful or not.

Again, this argument is just one more facet of th
government's attack upon the privilege against self-in
crimination and its purposes. If, as this Court has hel
the privilege is the essential mainstay of the America
system of criminal prosecution by accusation, then an
decision by this Court which upholds the use of a co
erced statement in a trial destroys that system of crim
inal prosecution. It matters not at all that the statemen
be true, or that there is other evidence necessary to con
vict, or that the statement goes to only a portion o
the prosecution's case. If coerced evidence can be use
in a criminal trial, then the American system of crim
inal prosecution can be defined as one which is at lea
in part inquisitorial, or one which is based at least i
part upon evidence procured by or in inquisitorial pro
ceedings. A decision by this Court holding as the gov
ernment urges in this case would not be merely a dec
sion concerning retroactivity, it would be revolutionary
Star Chamber and the Court on High Commission i
their modern guise of reporting statutes would agai
be proper methods by which government could coerc
"true" statements, or at least coerce "true" statement
from an accused which the prosecution honestly be
lieves would corroborate an "ample" or "overwhelming
case against persons suspected of criminal activitie
There is nothing in the history of this nation or fro
the decisions of this Court which foreshadows suc
a violent change in our system of criminal prosecu
tion; *cf. United States* v. *Lucia,* 5 Cir., 416 F. 2d 92
(1969); *Byers* v. *Justice Court,* ..... Cal. 2d ....., 80 Ca
Rptr. 553, 459 P. 2d 465 (1969), Petition for a writ o
certiorari filed *sub nom California* v. *Byers,* January 1
1970, No. 1070.

Further, in its first case concerning the retroactivity of its criminal decisions, this Court announced that retroactivity would be granted where the constitutional safeguard "went to the fairness of the trial—the very integrity of the fact finding process"; *Linkletter* v. *Walker*, 381 U.S. 618, 639. In the case at bar, the constitutional safeguard claimed goes behind "fairness" or "integrity", and goes to the essential nature of the trial itself. Because of the use of the coerced statements, Petitioner was not tried in any trial ever recognized by the American system of accusatorial prosecution. It can be truly said that he was never tried at all, and more than a new trial, he seeks what would be his first constitutional trial.

Since the criterion of purpose inexorably requires retroactivity, there is little reason to review the other factors relating to retroactivity. We think it obvious that past reliance by prosecutors upon their ability to try an accused with the assistance of the fruits of inquisitorial procedures could not militate against the accused's right to a new and constitutional trial. As to the third criterion, the effect on the administration of justice, we also think it irrelevant to coerced confession cases, and further note that the government simply urges guesses upon this Court. We see no good reason to further burden this Court with argument going to this criterion since it has been fully explored, and its myth destroyed, in the Brief for Petitioner in *Elkanich* v. *United States*, Oct. Term, 1969, No. 1142, now pending before this Court, at pp. A. 14-15. Petitioner here fully adopts that argument made by Petitioner in that case. Indeed, we join with Petitioner in *Elkanich* in urging this Court to adopt full and complete retroactivity for its constitutional deci-

sions in criminal law areas. But if this Court deems such a rule inappropriate, we urge that its prior decisions affirming and reaffirming the right of a person to have a trial free from coerced evidence or its fruits be again reaffirmed in the case at bar.

CONCLUSION.

The Judgment of the Court of Appeals for the Seventh Circuit affirming the order of the United States District Court for the Northern District of Indiana should be reversed, and this cause should be remanded to the United States District Court for the Northern District of Indiana with directions to vacate and set aside its order denying Petitioner's motion for relief under 28 U.S.C. Section 2255 and to enter its order granting Petitioner a new trial.

Respectfully submitted,

WILLIAM M. WARD
39 S. LaSalle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner,
Fred T. Mackey

FILE COPY

Supreme Court, U.S.
FILED
SEP 18 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 36

FRED T. MACKEY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER FRED T. MACKEY

WILLIAM M. WARD
39 S. LaSalle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner,
Fred T. Mackey

MIDWEST LAW PRINTING CO., INC. CHICAGO, ILL. FINANCIAL 6-2000

APPENDIX

In the United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

No. 18168
FRANK ZIZZO,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

September 9, 1970

Before SWYGERT, *Chief Circuit Judge,* MURRAH, *Senior Circuit Judge*[1] and CAMPBELL, *Senior District Judge.*[2]

CAMPBELL, *District Judge.* This cause comes before this court on petitioner's appeal from an order of the district court denying his motion presented pursuant to 28 U.S.C. §2255 and other post conviction relief provisions[3], seeking to vacate a prior imposed sentence and judgment of conviction.

Petitioner ("Zizzo") and three co-defendants were convicted of traveling in interstate commerce with the intent to promote, manage or carry on etc., an unlawful activity,

[1] Senior Circuit Judge Murrah of the United States Court of Appeals for the Tenth Circuit is sitting by designation.

[2] Senior District Judge Campbell of the Northern District of Illinois is sitting by designation.

[3] In the alternative of relief under §2255, petitioner sought relief in the nature of error coram nobis or for relief under rule 35, F.R.Cr.P. or under 28 U.S.C. §1651.

to wit, a gambling business illegal under the laws of the State of Indiana. 18 U.S.C. §1952 and 18 U.S.C. §2. The evidence in the case established that Zizzo operated a gambling business at various addresses in the State of Indiana. The government's proof against Zizzo also established that he employed three persons (co-defendants) in his gambling business who were residents of Illinois. The government's successful theory in convicting Zizzo was that his gambling operations in Indiana were the inducement for the interstate travel of his employees who were living in Illinois, and that he thus aided and abetted these three co-defendants in their travel and in their engaging in illicit gambling operations in Indiana.

In the course of his trial and over his objection federal wagering tax forms signed and filed by him as required by federal law (26 U.S.C. §§4401, 4411 and 4412) were introduced into evidence. His conviction was affirmed by this court. *United States* v. *Zizzo,* 338 F.2d 577 (1964). In affirming, this court rejected the contention that the use of the wagering tax forms and returns as evidence in his case violated Zizzo's privilege against self incrimination, citing *Lewis* v. *United States,* 348 U.S. 419 (1955); and *United States* v. *Kahriger,* 345 U.S. 22 (1953).These cases have since been overruled. *Marchetti* v. *United States,* 390 U.S. 39 (1968); and *Grosso* v. *United States,* 390 U.S. 62 (1968). In support of his motion to vacate his conviction, Zizzo contends that the rationale of the *Marchetti* and *Grosso* decisions should be applied retroactively and requires, under the facts of this case, that his conviction be vacated. In opposing petitioner's motion the government argues first that *Marchetti* and *Grosso* should not be given retroactive effect, and in the alternative, that their retroactive effect should not be applied to the facts of this case.

As to the retroactive effect of the *Marchetti* and *Grosso* decisions, we first note that the Supreme Court has not yet ruled on this question although the issue is presently before the Court in a number of cases which are awaiting argument. See *United States* v. *United States Coin and Currency,* Oct. Term, 1970 docket No. 5 and *Mackey* v. *United States,* Oct. Term, 1970 docket No. 36. Without attempting to predict how the Supreme Court may decide

ment made by the Government in the case at bar that the wagering tax returns "were not of great significance", and at worst their admission in evidence was harmless error (see Paragraphs I. of the Summary of Argument and Argument at pp. 12 and 15 respectively of the Brief for the United States).

We would further point out that Chief Circuit Judge Swygert, who sat on the panel which decided *Zizzo,* also sat on the panel which affirmed Petitioner's conviction in the original income tax evasion trial; *United States* v. *Mackey,* No. 14584, 7 Cir., 345 F. 2d 499 (1965).

It should be further noted that the Court's effort to distinguish *Mackey* from *Zizzo* is clearly erroneous in the light of this Court's decision in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, which held that statements or the fruits of statements coerced from a person in violation of his privilege against self-incrimination cannot be used "in any manner by Federal officials" in connection with a criminal prosecution against the witness (see Reply for Petitioner, pp. 19-23); and see *United States* v. *Tiktin,* 6 Cir., 427 F. 2d 1027 (1970) Celebreeze C. J., dissenting opinion); petition for a writ of certiorari filed *sub. nom. Tiktin* v. *United States,* No. 369, October Term, 1970.

Respectfully submitted,

WILLIAM M. WARD
39 South La Salle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner,
Fred T. Mackey

APPENDIX

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1969 — APRIL SESSION, 1970

No. 18168
FRANK ZIZZO,
Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Indiana, Hammond Division.

September 9, 1970

Before SWYGERT, *Chief Circuit Judge,* MURRAH, *Senior Circuit Judge*[1] and CAMPBELL, *Senior District Judge.*[2]

CAMPBELL, *District Judge.* This cause comes before this court on petitioner's appeal from an order of the district court denying his motion presented pursuant to 28 U.S.C. §2255 and other post conviction relief provisions[3], seeking to vacate a prior imposed sentence and judgment of conviction.

Petitioner ("Zizzo") and three co-defendants were convicted of traveling in interstate commerce with the intent to promote, manage or carry on etc., an unlawful activity,

[1] Senior Circuit Judge Murrah of the United States Court of Appeals for the Tenth Circuit is sitting by designation.

[2] Senior District Judge Campbell of the Northern District of Illinois is sitting by designation.

[3] In the alternative of relief under §2255, petitioner sought relief in the nature of error coram nobis or for relief under rule 35, F.R.Cr.P. or under 28 U.S.C. §1651.

to wit, a gambling business illegal under the laws of the State of Indiana. 18 U.S.C. §1952 and 18 U.S.C. §2. The evidence in the case established that Zizzo operated a gambling business at various addresses in the State of Indiana. The government's proof against Zizzo also established that he employed three persons (co-defendants) in his gambling business who were residents of Illinois. The government's successful theory in convicting Zizzo was that his gambling operations in Indiana were the inducement for the interstate travel of his employees who were living in Illinois, and that he thus aided and abetted these three co-defendants in their travel and in their engaging in illicit gambling operations in Indiana.

In the course of his trial and over his objection federal wagering tax forms signed and filed by him as required by federal law (26 U.S.C. §§4401, 4411 and 4412) were introduced into evidence. His conviction was affirmed by this court. *United States* v. *Zizzo,* 338 F.2d 577 (1964). In affirming, this court rejected the contention that the use of the wagering tax forms and returns as evidence in his case violated Zizzo's privilege against self incrimination, citing *Lewis* v. *United States,* 348 U.S. 419 (1955); and *United States* v. *Kahriger,* 345 U.S. 22 (1953).These cases have since been overruled. *Marchetti* v. *United States,* 390 U.S. 39 (1968); and *Grosso* v. *United States,* 390 U.S. 62 (1968). In support of his motion to vacate his conviction, Zizzo contends that the rationale of the *Marchetti* and *Grosso* decisions should be applied retroactively and requires, under the facts of this case, that his conviction be vacated. In opposing petitioner's motion the government argues first that *Marchetti* and *Grosso* should not be given retroactive effect, and in the alternative, that their retroactive effect should not be applied to the facts of this case.

As to the retroactive effect of the *Marchetti* and *Grosso* decisions, we first note that the Supreme Court has not yet ruled on this question although the issue is presently before the Court in a number of cases which are awaiting argument. See *United States* v. *United States Coin and Currency,* Oct. Term, 1970 docket No. 5 and *Mackey* v. *United States,* Oct. Term, 1970 docket No. 36. Without attempting to predict how the Supreme Court may decide

ment made by the Government in the case at bar that the wagering tax returns "were not of great significance", and at worst their admission in evidence was harmless error (see Paragraphs I. of the Summary of Argument and Argument at pp. 12 and 15 respectively of the Brief for the United States).

We would further point out that Chief Circuit Judge Swygert, who sat on the panel which decided *Zizzo,* also sat on the panel which affirmed Petitioner's conviction in the original income tax evasion trial: *United States* v. *Mackey,* No. 14584, 7 Cir., 345 F. 2d 499 (1965).

It should be further noted that the Court's effort to distinguish *Mackey* from *Zizzo* is clearly erroneous in the light of this Court's decision in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, which held that statements or the fruits of statements coerced from a person in violation of his privilege against self-incrimination cannot be used "in any manner by Federal officials" in connection with a criminal prosecution against the witness (see Reply for Petitioner, pp. 19-23); and see *United States* v. *Tiktin,* 6 Cir., 427 F. 2d 1027 (1970) Celebreeze C. J., dissenting opinion); petition for a writ of certiorari filed *sub. nom. Tiktin* v. *United States,* No. 369, October Term, 1970.

Respectfully submitted,

WILLIAM M. WARD
39 South La Salle Street
Chicago, Illinois 60603
ANdover 3-2180

Attorney for Petitioner,
Fred T. Mackey

of the constitutional privilege against self incrimination." *United States* v. *Lookretis*, 398 F.2d 64, 65 (1968).

Here, too, we believe that the disclosures compelled by petitioner's compliance with the wagering tax statutes are inadmissbile over his assertion of his privilege against self incrimination and their admission in this case must void his conviction. Although the *Lookretis* case was not complicated by the retroactive question, we believe the result we reach here logically follows our conclusion above that *Marchetti* and *Grosso* are to be applied retroactively. We also take note that our distinctions of *Mackey* and our reliance on *Lookretis* are similar in approach to the position taken by the Solicitor General in the brief for the United States filed before the Supreme Court in the *Mackey* case. In discussing the limits of the application of *Marchetti* and *Grosso*, the Solicitor General states:

> "Although the Court did not decide the question in *Marchetti* and *Grosso*, the introduction of wagering tax forms against a gambler in a prosecution for violation of a statute that is part of the 'comprehensive system of federal and state prohibtions against wagering activities' (*Marchetti* v. *United States, supra*, 390 U.S. at 48) presumably would be barred by the privilege against self-incrimination. See *United States* v. *Lookretis*, 398 F.2d 64 (C.A. 7). This result would seem to follow because such a statute is one of those that led the Court to conclude that the privilege could be asserted as a defense to the charge of failing to pay the occupational or excise tax on gambling, since otherwise incrimination thereunder would potentially result. But the federal income tax laws are not part of that comprehensive statutory system." (Brief, p. 24).

The government attempts to further distinguish *Lookretis* by arguing that the wagering tax returns were introduced only to prove Zizzo's knowledge that his employees resided in Illinois — a fact which may not be essential to the crime. See *United States* v. *Miller*, 379 F.2d 483 (7th Cir. 1967). In other words, the wagering tax returns were "unnecessary to prove the elements of the offense".

een admitted into evidence,
d elements of the offense
and the trier of fact could
ved at a different verdict."

- apparently a variation of
ess error doctrine — based
ality. See *United States* v.

n the decision of the district
dgment order of conviction
cause is remanded to the
eedings consistent with this

f the United States Court of
ls for the Seventh Circuit.

sion before publication
eports. Readers are re-
Supreme Court of the
typographical or other
e made before the pre-

NITED STATES

, 1970

t of Certiorari to
nited States Court
peals for the Seventh
t.

he judgment of the
CHIEF JUSTICE, MR.
BLACKMUN join.

March 1963 charging
counts of evading
fully preparing and
audulent tax returns
in violation of 26
1964, a jury in the
rict of Indiana found
The conviction was
of Appeals for the
965. 345 F. 2d 499
5).

ment used the net-
income taxes.[2] As
wagering excise tax
ach of the five years
petitioner pursuant

ears' imprisonment and a
terms to be served con-

and approved in *Holland*
iedberg v. *United States*,
es, 348 U. S. 147 (1954);
1954).

at 415; the privilege "is not an adjunct to the ascer-
ent of truth," but is aimed at serving the complex
ues on which it has historically rested. 382 U. S.,
. Given this purpose, clear reliance on the pre-
rules, and the frustration of state interests which
ctivity would have entailed, we refused relief to a
risoner seeking collateral relief although the prose-
s comment on his failure to take the stand at his
would have infringed the new rule that was an-
ed in *Griffin* and was being applied in contemporary

nson v. *New Jersey*, 384 U. S. 719 (1966), reaffirmed
ew of the Fifth Amendment by declining to apply
iranda[7] rules to cases pending on direct review as
s to those involving applications for collateral re-
Stating that the "prime purpose of these rulings
guarantee full effectuation of the privilege against
crimination, the mainstay of our adversary system
minal justice," 384 U. S., at 729, the Court also
ized that the new rules to some extent did guard
t the possibility of unreliable admissions given
custodial interrogation. *Id.*, at 730. The ques-
however, was one of "probabilities." The hazard
rustworthy results in past trials was not sufficiently
ent to require retroactive application in view of
xisting, well-defined remedies against the use of
involuntary confessions, the obvious fact that the
arnings had not been standard practice prior to
da, and the consequent disruption to the adminis-
of the criminal law.

II

ded by our decisions dealing with the retroactivity
v constitutional interpretations of the broad lan-

[7] *anda* v. *Arizona*, 384 U. S. 436 (1966).

guage of
Appeals
retroactiv
was conv
constitut
claim on
retroacti
the Cour
mentatio
that doe
the relia
There is
of the
that the
zens to
was the
given.
sideratio
tax retu
of the c
reliabili
obvious
Nor do
oath—
excise
tion of
is conc
tained
by this
Desist,
be tha
employ
active

[8] See

f Rights, we agree with the Court of *hetti* and *Grosso* should not have any on Mackey's conviction. Petitioner trict accordance with then-applicable ns. Mackey would have a significant *chetti* and *Grosso* must be given full But in overruling *Kahriger* and *Lewis*, e was to provide for a broader imple- fth Amendment privilege—a privilege de at its core a concern for improving he results reached at criminal trials. tion in *Marchetti* or *Grosso* that one ons which moved the Court to hold could not constitutionally compel citi- gamblers and file related tax returns unreliability of such statements once has not advanced any objective con- ng such unreliability. The wagering ced in evidence at his trial have none es, and hence none of the potential un- ed confessions produced by "overt and *Johnson, supra,* 384 U. S., at 730. suggest that his returns—made under ate in any respect.[8] Thus, a gambling ike physical evidence seized in viola- rpretation of the Fourth Amendment, vant and probative even though ob- ernment through means since defined constitutionally objectionable. As in and *Williams*, the result here should *chetti* trial in which the Government dence is not set aside through retro- of the new constitutional principle.

ED STATES

hat *Marchetti* and *Grosso*
bout the accuracy of the
e. Under these circum-
ted by *Elkanich* and *Wil-*
d *Johnson*, must control.
te that even though deci-
Amendment may create
curacy of the results of
e decisions are adequately
ation. Accordingly, the
peals is affirmed.

It is so ordered.

SUPREME COURT OF THE

Nos. 36, 81, AND 82.—OCTOB

Fred T. Mackey, Petitioner, 36 *v.* United States.	On
Clarence Williams, Petitioner, 81 *v.* United States.	On
Joseph Elkanich, Petitioner, 82 *v.* United States.	

[April 5, 1971

MR. JUSTICE HARLAN, concurri
and dissenting in No. 81.

These three cases have one
the extent to which new constitu
by this Court for the conduct of c
cable to other such cases which wer
ent but then prevailing constitut

One of these cases is before us
81, *Williams*, the other two be
review, No. 82, *Elkanich*, and No
instance the new rule is held n
consequence, the judgments belo
reaching the merits of the und
sented. Two of the cases, *Willi*
volve the Court's decision in *Ch*
U. S. 752 (1969), changing the
permissible searches and seizure

STATES

1970

Certiorari
ited States
Appeals for
n Circuit.

Certiorari
ited States
Appeals for
Circuit.

36 and 82

common:
prescribed
s are appli-
nder differ-

eview, No.
n collateral
y. In each
le, and, in
ed, without
stions pre-
kanich, in-
fornia, 395
ne scope of
o a lawful

largely eventuated in little more than a reaffirmation of the post-*Linkletter* developments.

What emerges from today's decisions is that in the realm of constitutional adjudication in the criminal field the Court is free to act, in effect, like a legislature, making its new constitutional rules wholly or partially retroactive or only prospective as it deems wise. I completely disagree with this point of view. While I do not subscribe to the Blackstonian theory that the law should be taken to have always been what it is said to mean at a later time, I do believe that whether a new constitutional rule is to be given retroactive or simply prospective effect must be determined upon principles that comport with the judicial function, and not upon considerations that are appropriate enough for a legislative body.

I

At the outset, I think it is clear that choosing a binding, generally applicable interpretation of the Constitution presents a problem wholly different from that of choosing whether to apply the rule so evolved "retroactively" to other cases arising on *direct* review.

In adopting a particular constitutional principle, this Court very properly weighs the nature and purposes of various competing alternatives, including the extent to which a proposed rule will enhance the integrity of the criminal process and promote the efficient administration of justice, as well as the extent to which justifiable expectations have grown up surrounding one rule or another. Indeed, it is this very process of weighing such factors that should constitute the core of our task in giving concrete embodiment to those constitutional commands that govern the procedures by which the state and federal governments enforce their criminal laws.

But we possess this awesome power of judicial review, this duty to bind coordinate branches of the federal sys-

to avoid making new legal norms through
n of dicta. This serious interference with
ve process is justified only by necessity, as
task of applying the Constitution to cases
Simply fishing one case from the stream of
view, using it as a vehicle for pronouncing
utional standards, and then permitting a
milar cases subsequently to flow by unaffected
w rule constitutes an indefensible departure
nodel of judicial review.

not resolve all cases before us on direct review
our best understanding of governing consti-
nciples, it is difficult to see why we should so
any case at all. If there is no need for an
tarian judicial control over the content of our
n in nine cases precisely like that presented
imel's dispute with the State of California, it
see the necessity, wisdom or justification for
nat control in the *Chimel* case itself. In truth,
assertion of power to disregard current law in
g cases before us that have not already run
urse of appellate review, is quite simply an
hat our constitutional function is not one of
on but in effect of legislation. We apply and
interpret the Constitution, under this view
not because we are bound to, but only because
nally deem it appropriate, useful, or wise. That
oice may permissibly be made by a legislature
il of revision, but not by a court of law.

ion that cases before us on direct review need
udicated in accordance with those legal princi-
ning at the time we are possessed of jurisdic-
e case entails additional significant untoward
ces. By this doctrine all other courts in this
re, in effect, reduced largely to the role of autom-

finitum what I view
ces of this aspect of
doctrine. For me,
an inexplicable and
asic principle upon
l review is sufficient
e to believe that a
court of law, charged
resolve every legal
direct review, man-
s at the time, not as
ature, purposes, and
rule is essential to
rule should be made
y is, however, quite
ce a rule has been
ic, which cases then
verned by it.

ussion, only *Williams*
criminal judgments.
ey, were brought here
king release through
s.[1] At the time their

ners are entitled to seek
. C. § 2241, while federal
inated a motion to vacate
ever, our cases make these
urpose of substituting a
beas action in the federal
urisdictional basis for the
U. S. 205 (1952). As I
for retroactivity purposes,
ng collateral relief, I shall
procedures as the writ of
ng such judgments as cases

ed States, supra. This is not to say, however, that
nction of habeas corpus is to provide a federal
for determining whether any individual is pres-
in custody in violation of the Constitution . . . of
ited States," 28 U. S. C. § 2254, in the sense that
is for his incarceration would, under the law exist-
the time a petition is filed or adjudicated, as dis-
hed from the law that was applicable at the time
viction became final, be held free of constitutional
Cf. Meador, Habeas Corpus and the "Retro-
" Illusion, 50 Va. L. Rev. 1115 (1964).

e it has been generally, although not universally,
d that habeas courts should apply current con-
nal law to habeas petitioners before them,[3] I do
ieve this is or should be the correct view. First,
proposition has ever been squarely considered and
ed by this Court, at least since the recent prolifer-
of criminal defendants' protected constitutional
and the concomitant expansion of the writ.[4]

---

ssor Mishkin has pointed out that "prior to *Linkletter*,
eria applied in federal habeas corpus proceedings were
y the constitutional standards in effect at the time of those
ngs, regardless of when the conviction was actually entered."
The Supreme Court, 1964 Term—Foreword: The High
he Great Writ and the Due Process of Time and Law,
L. Rev. 56, 78 (1965). See also, *e. g.*, Note, Developments
aw—Federal Habeas Corpus, 83 Harv. L. Rev. 1040, 1151,
970); *Sanders* v. *United States*, 373 U. S. 1, 17 (1963);
Gladden, 341 F. 2d 972, 975 (CA9 1965).

counter-example, see *Milton* v. *Wainwright*, 306 F. Supp.
Fla. 1969), where a district judge adjudicating a habeas
declined to consider any of this Court's decisions relating
untary confessions that post-dated 1958, the time at which
ioner's murder conviction became final. See also n. 4 *infra*.
ably, *Reck* v. *Pate*, 367 U. S. 433 (1961), tacitly holds that
petitions must be judged in accordance with current law.
rt there directed the issuance of the writ on the grounds

Moreov
convicti
appears
and *Ka*
Court f
constitu
review
both th
tional n
217, 22
itself c
constitu
promote
as I ex

---

that petit
the intro
relying h
The Dist
admissibil
ing in 19
745–746
not expr
produced
criminal

[3] In 19
Court's d
of *res ju*
subsectio

"In a
in custod
judgment
or review
clusive a
the Supr
and the
fact whi

ng current constitutional standards to
ed while different views were ascendant
ry to achieve the ends sought by *Brown*
The primary justification given by the
ng the scope of habeas to all alleged
rs is that it provides a quasi-appellate
forcing trial and appellate courts in
and state system to toe the constitu-
Kaufman v. *United States*, 394 U. S.
However, the opinion in *Kaufman*
hat there is no need to apply new
es on habeas to serve the interests
decision. 394 U. S., at 229. Further,
e margin below,[5] Congress, in at least

ction, finalized in 1936, had been procured by
evidence of an illegally obtained confession,
es decided by this Court subsequent to 1936.
in denying relief, had clearly held that the
nfession was to be judged by standards prevail-
States ex rel. Reck v. *Ragen*, 172 F. Supp. 734,
9). However, this choice of law problem was
d to and the case arose before this Court
enlargement of new constitutional rules of

amended the habeas statutes to deal with this
Sanders v. *United States*, 373 U. S. 1 (1963),
iples as they apply to habeas corpus. One
statute provides:
is proceeding brought in behalf of a person
to the judgment of a State court, a prior
eme Court of the United States on an appeal
decision of such State court, shall be con-
s of fact or law . . . actually adjudicated by
herein, unless the applicant . . . shall plead
nd the existence of *a material and controlling*
ppear in the record of the proceeding in the

ainly to have disapproved
nstitutional interpretation
lving state convictions.
regard this issue as not
onsequently, I go on to
solved. For me, with a
mpeting policies properly
that, given the current
ues cognizable on habeas,
abeas petitions, generally

been put in by exercising due
emphasis added).
uding a change in the law, it
ded in these circumstances for
hat "fact" is properly read nar-
t of subsections (a) and (b)
petition (where there was no
a "new ground" or "a factual
he [prior] hearing." Although
rse, it fully supports this read-
nmittee reports accompanying
rpose of the reformulation of
sure of finality into the law by
the *res judicata* concept. See
g., 2d Sess. 1966); S. Rep. No.
. There was no relevant floor

ce can properly be drawn that
those prisoners whose convic-
tionally determined that other
selves of all new constitutional
bsections (a) and (b) certainly
The congressional committee
that these amendments were
easible or desirable finality in
it is difficult to imagine what
stinction merely between those
e in the remote past, had full

to apply the law prevailing at th
became final rather than to seek t
cases on the basis of intervening cha
interpretation.

I do not mean to neglect the fo
contentions. Assuring every state
a forum in which he can continu
rent constitutional validity of the
tion does tend to assure a uni
treatment among prisoners; pro
correcting abuses now, but not fo
severely detrimental to societal in
promote a rough form of justice,
sense that current constitutional r
more "correct" or "just" than thos

In my view, however, these in
overstated. Some discrimination
the legal treatment of criminal co
where the governing law is co
change. And it has been the law,
as long as anyone currently in j
ated, that procedures utilized to co
been fundamentally fair, that is, i
command of the Fourteenth Am
state shall . . . deprive any pers
property, without due process of l
Jersey, 211 U. S. 78 (1908). Mo
suggest that constitutional updati
to assure that the system arrives o
By hypothesis, a final conviction
been adjudicated by a court cogniz
stitution and duty-bound to appl
conclusion reached by one of th
somehow forever erroneous becaus
took a different view of the relev
mand carries more emotional th

conviction
of all these
nstitutional

ntervailing
al prisoner
te the cur-
his convic-
f ultimate
method of
erceived as
d tends to
ted, in the
efully ring
arded.

too easily
ys exist in
n a system
subject to
for at least
n incarcer-
must have
ce with the
hat "[n]o
liberty, or
ing v. *New*
too easy to
ry in order
ect" results.
ederal, has
ederal Con-
rgue that a
" courts is
this Court
tional com-
force. No

is worth having and enforcing, it must at some time provide a definitive answer to the questions litigants present or else it never provides an answer at all. Surely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints. But this does not mean that in so doing, we should always be halting or tentative. No one, not criminal defendants, not the judicial system, not society as a whole is benefited by a judgment providing a man shall tentatively go to jail today, but tomorrow and every day thereafter his continued incarceration shall be subject to fresh litigation on issues already resolved.

A rule of law that fails to take account of these finality interests would do more than subvert the criminal process itself. It would also seriously distort the very limited resources society has allocated to the criminal process. While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when finalized. See *Friendly, supra,* at 148–149. This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very fact of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first. See Amsterdam, Search, Seizure, and Section 2255: A Comment, 112 U. Pa. L. Rev. 378, 384 (1964).

In sum, while the case for continually inquiring into the current constitutional validity of criminal convictions

ilable for attacking convictions on such grounds.[8]
elieve, is because it represents the clearest in-
here finality interests should yield. There is
ietal interest in permitting the criminal process
at a point where it ought properly never to
Moreover, issuance of the writ on substantive
ess grounds entails none of the adverse collateral
nces of retrial I have described above. Thus, the
interest in freeing individuals from punishment
uct that is constitutionally protected seems to
ciently substantial to justify applying current
of substantive due process to petitions for habeas
See generally Part II of my opinion for the
United States v. *United States Coin and Cur-*
— U. S. — (1971).

dly, I think the writ ought always to lie for
f nonobservance of those procedures that, as so
scribed by Mr. Justice Cardozo in *Palko* v. *Con-*
302 U. S. 319, 325 (1937), are "implicit in the
of ordered liberty." Typically, it should be the
t any conviction free from federal constitutional
the time it became final, will be found, upon re-
to have been fundamentally fair and conducted
hose procedures essential to the substance of a
ring. However, in some situations it might be
ne and growth in social capacity, as well as ju-
erceptions of what we can rightly demand of the
tory process, will properly alter our understand-
the bedrock procedural elements that must be
o vitiate the fairness of a particular conviction.

. *g.*, *Ex parte Siebold*, 100 U. S. 371 (1879); *Crowley* v.
en, 137 U. S. 86 (1890); *Yick Wo* v. *Hopkins*, 118 U. S.
6). And see cases collected in Amsterdam, Search, Seizure,
on 2255: A Comment, 112 U. Pa. L. Rev. 378, 384 n. 30
nd the discussion therein of the finality implications such
present.

at the interest in
interests protected
. *Texas*, 385 U. S.
senting opinion of
re correctly marks
not only in terms
apply on habeas,
cular rule may be
f a case depending
I find inherently
between those new
e factfinding proc-
to further other
e the Court's dif-
basis, retroactivity
rsey, 384 U. S. 719
. 293 (1967); and
1968). *Williams* v.

engths to point out
e in attempting "to
sion has really an-
r it has simply ap-
principle to govern
those which have
ior case law." 394
263–269. I remain
nd realize they will
ering the writ, but
orated by adequate
ty in the operation

on, which is already
not been directly
announced in these

ral due process as to require upsetting this convic-
in spite of the fact that it was perfectly lawful when
ized. The agents here clearly had probable cause
rest petitioner, were not undertaking a fishing expe-
n for any evidence they might find but rather were
ng for specific items that they had reason to believe
t be concealed in various places around the premises
indeed, generally limited their search to areas indi-
l by petitioner. I would affirm the judgment below.

C

ackey v. *United States* (collateral review). Peti-
r in this case seeks relief from confinement by way
abeas. At his trial for evading payment of income
, part of the Government's case in chief consisted
ne introduction of 60 wagering excise tax returns.
he time his conviction became final in 1965, the
duction of these statements would have been per-
ible under the authority of *United States* v. *Kahriger*,
U. S. 22 (1953). I find it unnecessary to inquire
her it inevitably follows from the new rule enun-
d in *Marchetti* and *Grosso* that such a procedure
d today be held an unacceptable abridgement of
ioner's Fifth Amendment right to be free of com-
ory self-incrimination. For, even assuming the
r cases, if applicable, would produce a different re-
I cannot conclude that this change in the law
d be sufficient to entitle petitioner to the issuance
writ of habeas corpus.

ackey is not asserting that the conduct for which
s being punished, evading payment of his federal
ne taxes, has been held to be constitutionally im-
e from punishment. In this regard, Mackey's claim
rs from that raised by the respondent in *Coin and*

re at issue. Instead, Mackey's claim is
ures utilized in procuring his conviction
y the *Marchetti* and *Grosso* decisions.
f procedure rather than substance are
rt II of this opinion, I would apply to
f this habeas petition the law in effect
ckey's conviction became final, absent a
e procedures employed were fundamen-
hile *Kahriger* did indeed, in my judg-
n an "excessively narrow" view of the
ilege against self-incrimination, I cannot
ght reveals that judgment to have been
eous as to amount to the perpetration
le inequity against Mackey in these cir-
espite our rejection of it as a matter of
nt policy, the prior justification of the
tivity in this area—that persons affected
imination by ceasing to engage in illegal
t without some force.

question is, for me, not free of difficulty,
ne judgment below for the reasons stated

V

the Court in deciding these cases seems
orgotten the limitations that accompany
a court of law. For the retroactivity
ced today bespeaks more considerations
of legal principle. Treating direct and
as if they were of one piece seems
alysis, ignoring, as it does, the jurispru-
ations that differentiate the two kinds
functions. As a court of law we have
ect review to treat one case differently
ith respect to constitutional provisions

resettling the limits of the
which under the recent deci-
been given almost boundless
is prepared to do this I can
solution to the retroactivity
very much regret to see the
proach to that problem now
dence of this Court.
ments in Nos. 36 and 82 and
No. 81 upon the premises dis-

in its result, I am now of the view
n better decided had it simply held
s not lie for claimed errors in the

SUPREME COURT OF THE

No 36.—October T

Fred T. Mackey, Petitioner, } On
v. th
United States. } of C

[April 5, 19

Mr. Justice Brennan, with
shall joins, concurring in the

Three years ago we held that
statutes, 26 U. S. C. § 4401 *et*
whom they applied to such a re
of self-incrimination that thos
employed to punish criminally
defended a failure to comply
with a proper assertion of th
incrimination." *Marchetti* v. *U*
42 (1968); *Grosso* v. *United St*
This case presents the questio
Government is entitled to ma
returns, filed pursuant to the
prosecution for income tax
the Fifth Amendment does no
returns to show a likely sou
in a criminal prosecution fo
concur in the judgment of the

[1] This view of the case makes it
whether petitioner's conviction shou
to the standards embodied in *March*
this opinion is written on the assum
are applicable.

D STATES

Certiorari to
States Court
r the Seventh

JUSTICE MAR-

wagering tax
cted those to
antial danger
ould "not be
ons who have
requirements
against self-
, 390 U. S. 39,
S. 62 (1968).
any, use the
ng excise tax
scheme, in a
ace I believe
e use of such
orted income
ax evasion, I

or me to decide
without regard
The balance of
hetti and *Grosso*

United States, 390 U. S. 62 (1968); *Heike* v. *United States*, 227 U. S. 131, 143–144 (1913); *Counselman* v. *Hitchcock*, 142 U. S. 547, 584–586 (1892). Since petitioner filed the wagering tax returns under threat of criminal prosecution for failure to do so, 26 U. S. C. § 7203, and since he never knowingly waived his Fifth Amendment privilege, see *Grosso* v. *United States*, *supra*, at 70–71, he is entitled to the immunity required by the Fifth Amendment. *Adams* v. *Maryland*, 347 U. S. 179, 181 (1954). Therefore, petitioner argues, the Government was foreclosed from using the information provided by him on the wagering tax returns against him in a criminal prosecution for evasion of the income tax.

But in *Marchetti* and *Grosso*, we dealt with the question whether, in light of possible uses of testimonial evidence sought to be compelled over a claim of privilege, the Fifth Amendment allows the individual concerned to withhold the evidence without penalty. In the present case, however, we deal with the scope of immunity required when the privilege is claimed and the evidence is nevertheless compelled. This distinction, in my view critical, is overlooked by petitioner. Where testimony has been refused, adjudication of necessity must take place in something of a vacuum. Although an individual may not "draw a conjurer's circle around the whole matter" by refusing to provide any explanation why the information sought might be incriminating, *United States* v. *Sullivan*, 274 U. S. 259, 264 (1927), he need not provide the incriminating evidence in order to demonstrate that the privilege was validly invoked. *Hoffman* v. *United States*, 341 U. S. 479, 486 (1951). In such circumstance, sanctions may be applied for refusal to testify only if it is " '*perfectly clear*, from a careful consideration of all the circumstances in the case, . . that the answer[s] *cannot possibly* have [a] tendency

tivities ancillary to wagering.[3] *Id.*, at 44. On is we concluded that "throughout the United vagering is 'an area permeated with criminal stat- nd those engaged in wagering are a group 'in- suspect of criminal activities.' *Albertson* v. 382 U. S. 70, 79." *Marchetti*, 390 U. S., at 47. ngly, registration and payment of the occupa- ax, or the filing of a wagering excise tax return e Government required as a prerequisite to pay- f the excise tax,[4] would subject the individual ed to " 'real and appreciable,' and not merely ary and insubstantial,' hazards of self-incrimina- *Id.*, at 48; *Grosso*, 390 U. S., at 64–67. Since we the "required records" doctrine of *Shapiro* v. *States*, 335 U. S. 1 (1948), inapplicable to the y requirement that a gambler admit his present re involvement in gambling activity, *Marchetti*, S., at 55–57; *Grosso*, 390 U. S., at 67–69, we held e privilege against self-incrimination was available petitioners as a defense to prosecution for failure ter for, report, or pay the federal wagering taxes.[5]

---

8 U. S. C. §§ 1084 (interstate transmission of wagering infor- 1301–1304 (conduct of lotteries by mails or broadcasting), terstate travel in aid of, *inter alia*, gambling), 1953 (inter- nsportation of wagering paraphernalia).

were informed by the United States in *Grosso* that the excise tax would not be accepted unless accompanied by ired return. 390 U. S., at 65.

ddition, we declined in both *Marchetti* and *Grosso* the Gov- 's invitation to salvage the statutory scheme by imposing rictions on the information required. *Marchetti*, 390 U. S.,); *Grosso*, 390 U. S., at 69. The relevance of this to the fore us is discussed *infra*, at ———. For the moment ficient to note that even the imposition of use restrictions ot have saved the convictions at issue in those cases, for tioners obviously had no way of knowing, when they failed ter and file the required forms, that use restrictions might osed. See *Murphy* v. *Waterfront Comm'n*, 378 U. S. 52,

les provided under
e Emergency Price
rivilege had been
would (as they did)
Act. We rejected
ment has power to
nsactions which are
ntal regulation and
established.'" *Id.*,
ivan, 274 U. S. 259
ne privilege against
dual whose income
f income tax return
noted the possibility
to excuse reporting
se that alone would
n had produced the
her in *Sullivan* nor
slightest suggestion
close the income he
osure will indicate a
that income.
ot insulate inquiries
formation merely by
dent of a regulatory
atutory scheme is to
may not be enforced
neir violations. See
States, 390 U. S. 85
S. 70 (1965). But
designed to forbid

red only the keeping of
tion there was compelled
But as we noted in *Mar-*
ndistinguishable from a

ingly, the considerations that led us to decline the imposition of use restrictions for the future in *Marchetti* and *Grosso* are not compelling in situations where the incriminating information has already been disclosed. Petitioner is therefore entitled to the immunity required by the Fifth Amendment, and to no more. Since I believe the Amendment is no bar to the use to which his wagering tax returns were put, I concur in the judgment of the Court.

OURT OF THE UNITED STATES

36.—October Term, 1970

Petitioner,
ates.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[April 5, 1971]

Douglas, with whom Mr. Justice Black ng.

d that all criminal and civil decisions tutional defenses which go in favor of ere necessarily retroactive. That is to ution has from Chief Justice Jay's time ,* for there were no decisions on the reto. *Marchetti* v. *United States*, 390 *Grosso* v. *United States*, 390 U. S. 62, ndants who when they did these acts ason of *United States* v. *Kahriger*, 345 d to a constitutional immunity. Why *Grosso* are entitled to relief and *Mackey* ery. It is said that Mackey's gambling ysical evidence seized in violation of a ion of the Fifth Amendment, is con- and probative even though obtained by through means since defined by this itutionally objectionable." The same *Marchetti* and *Grosso*. Yet they won

stand today's decision if *Marchetti* and unced only a prospective rule applicable

utional rule forged by the Court,
e, if justice rather than the for-
the time of the trial is the stand-
f the old unconstitutional rule
qually.

the Constitution that authorizes
s to be prospective and others be
ity often says the test is whether
egrity of the fact-finding process,
, 394 U. S. 244. Yet even that
en the majority thinks that the
if applied with due regard to the
would be "devastating." *Tehan*
19. The Constitution grants this
e powers.

expressed in *Linkletter* v. *Walker*,
Johnson v. *New Jersey*, 384 U. S.
to them. I would continue to
nal safeguards "strictly."

D OF

CASE